TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ '49

No. ~~431~~ 13

UNITED STEELWORKERS OF AMERICA, ET AL.,
PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 24, 1948.

CERTIORARI GRANTED JANUARY 17, 1949.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 9612

INLAND STEEL COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

UNITED STEELWORKERS OF AMERICA,
C.I.O., et al.,

Intervenors-Respondents.

No. 9634

UNITED STEELWORKERS OF AMERICA,
C.I.O., et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petitions for Review of Orders of the National Labor Relations Board

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APPENDIX TO BRIEF FOR PETITIONERS IN CASE No. 9634

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 13-C-2836

In the Matter of
INLAND STEEL COMPANY
and
LOCAL UNIONS NOS. 1010 and 64, UNITED STEEL-WORKERS OF AMERICA (CIO)

Mr. Herman J. De Koven, for the Board.

Pope & Ballard, by *Mr. Ernest S. Ballard*, and *Mr. Merrill Sheppard*, of Chicago, Ill., and *Mr. William G. Caples*, of Chicago, Ill., for the Respondent.

Mr. Frank J. Donner, of Washington, D. C., for the Union.

DECISION AND ORDER

On January 8, 1947, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceedings, finding that respondent, Inland Steel Company, had engaged and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent, counsel for the Board, and Local Unions Nos. 1010 and 64, United Steelworkers of America, herein called the Union, all filed exceptions and supporting briefs.

On June 3, 1947, the Union filed a motion to reopen the record for the purpose of introducing documentary evidence purporting to show that at a time after the hearing, social insurance plans (including plans for old age retirement benefits and sick and accident benefits) were subjects of collective bargaining throughout the basic steel industry of which the respondent is a part, and that such collective bargaining has resulted in a number of joint agreements embodying provisions for employer-financed social insurance plans. This motion is opposed by the respondent on the ground that the proffered evidence is immaterial to the central issue of whether pension plans *must* be the subject of collective bargaining

between an employer and the representative of its employees under the Act, and on the further ground that, insofar as the proffered evidence tends to show what *may* be appropriately included in a collective bargaining contract, it is cumulative.

We do not agree with the respondent that the proffered evidence is immaterial, because one of the grounds upon which respondent bases its position that the Act does not obligate bargaining about pension and retirement plans is that such plans are not, as a practical matter, adaptable to the processes of collective bargaining or to the device of a trade union agreement. Clearly, therefore, actual proof of the existence of trade union agreements providing for employer-financed pension and retirement plans or for similar employee benefit plans provides a valid means for the Union to meet the respondent's position and would be relevant. Such proof, however, is available in the record as it now stands,[1] as well as in the facts reported in official publications of government agencies of which we take judicial notice.[2] Accordingly, we hereby deny the Union's motion for leave to reopen the record.

On November 18, 1947, the Board at Washington, D. C., heard oral argument, in which respondent and the Union participated.

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The Board has considered the Intermediate Report, the exceptions and briefs filed by respondent, the Union and the Board's counsel, the arguments of counsel, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner[3] insofar

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[1] Respondent makes no claim that the nature of the industry is a factor in the possible impracticability of the trade union agreement device.

[2] Cf. *Matters of Sorg Paper Co.*, 25 N.L.R.B. 936, 950.

[3] Respondent apparently contends that adoption of the opinion of the Trial Examiner on the question of law presented by the issue of statutory construction would constitute a violation of its constitutional right to a fair hearing. This contention is based upon the fact that, for the purpose of seeking enlightenment as to certain pertinent interpretative facts, the Trial Examiner did not confine his search to the numerous publications of various economic and labor relations authorities which were included in the briefs of the parties and were incorporated in the record by stipulation of the parties. We find no merit to this contention. For, as the Supreme Court has plainly indicated,

as such findings, conclusions, and recommendations are consistent with the decision and order which follows.

The Trial Examiner found that the respondent had engaged and is engaging in violations of Section 8 (5) and (1) of the Act[4] by failing and refusing to bargain with the Union about the application or modification of the terms of an old age retirement and pension program.[5] This program was originally established by respondent at a time antedating the employees' of a statutory representative in 1941; it was unilaterally amended in December 1944 [6] and in December 1945, and, as so amended, its terms were invoked in or after February 1946 to effect the separation of employees from active service. The Examiner's findings as to the existence of unfair labor practices stem from the respondent's failure and refusal to discuss with the Union, in 1945 and 1946, the amendment and application of the terms of the pension and retirement program and their relation to the collective bargaining contract then in effect. In the opinion of the Trial Examiner, the respondent, by *unilaterally* amending the pension program, actually changed the employees' "wages" and "conditions of employment" as these terms are used in Section 9 (a) of the Act.

The factual findings respecting the respondent's refusal and failure to discuss its pension program with the Union are not

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resort by officials acting in a judicial capacity to all relevant extrinsic aids to meaning of statutory terms is an appropriate corollary to the exercise of the judicial function and is commanded by common sense. See e.g., *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 183-186; *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 335; *N.L.R.B.* v. *Hearst Publications, et al.*, 322 U.S. 111, 121-122, 127; Cf. *Republic Aviation Co.* v. *N.L.R.B.*, 324 U.S. 793, 799-800. See also Ziskind, *Use of Economic Data in Labor Cases*, 6 Univ. of Chicago Law Review 607 (1939).

Moreover the major portion of the information we have here used is available in numerous official publications of government agencies which we cite herein.

As we have indicated above, we may and do take judicial notice of the facts reported in such publications.

[4] Section 8 (5) and (1) of the Act have been reenacted as Section 8 (a) (5) and Section 8 (a) (1).

[5] In setting forth the facts concerning the first amendment of the pension program, the Trial Examiner states that the amendment was effected December 1943. The record shows that the amendment was executed by respondent in December 1944 or January 1945, but the terms of the amendment became retroactively effective in December 1943.

seriously disputed. The legal conclusion that these acts constitute unfair labor practices within the meaning of Section 8 (5) and (1) of the Act is, however, squarely challenged on two principal grounds. One is premised upon a construction of the Act as excluding pension and retirement plans from the mandatory area of collective bargaining. The other is premised upon a construction of the collective bargaining agreement in effect between these parties at the time the refusals to bargain occurred, as containing a waiver by the Union of any right to bargain about pension and retirement programs. We shall consider each of these broad defenses separately.

A. Respondent's contention as to the meaning of the statutory provisions

The respondent claims that the term "wages," as used in the Act, means the "wages earned" by employees for actual performance of work or productive activity, and that pension benefits are based on the economic philosophy that holds that such benefits are not earned by the expenditures of productive effort on the part of employees, but are determined by the length of time over which employees perform their work.[4] We are of the opinion, however, that regardless of the validity of this economic philosophy of pension benefits, there is no basis for concluding that such a narrow and technical definition of "wages" was intended by Congress in delineating the statutory area of collective bargaining.

One of the broad purposes of the Act, as set forth in Section 1 thereof, is to encourage collective bargaining as to "wage rates and the purchasing power of wage earners" as a means of eliminating industrial strife. To implement this objective, the Congress, in generally defining the ambit of obligatory collective bargaining, used not only the specific terms "rates of pay" and "hours of employment," but also the broad generic and widespread phrase *"wages and other conditions of employment."* It is significant that the same Congress which

[4] This is the opinion of one expert in the field of the construction of industrial pension plans. See A. D. Cloud, *Pensions in Modern Industry* (Chicago, 1930) pp. 28, 439, 441, 444-445; Cf. Murray W. Latimer, *Industrial Pension Plans* (Industrial Counsellors, Inc., 1932), pp. 9-10, 751-754, 764-766, 771-789, 894-921.

originally enacted the statutory provisions here involved also enacted the Social Security Act, and that the provisions of both statutes were part of the over-all legislative scheme of broad social legislation.[1] In the Social Security Act, Congress defined the taxable "wages" paid for "employment" as embracing all "remuneration" for "any service . . . performed . . . by an employee for his employer."[2] The Supreme Court recently stated that in employing these terms for the purpose of accomplishing broad social policies, Congress was not thinking of "wages earned" for "work done," but of "the entire employer-employee relationship for which compensation is paid to the employee by the employer."[3]

With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term "wages" as used in Section 9 (a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. There is indeed an inseparable

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[1] The Fifth Circuit Court of Appeals recently admonished the Board that "definition by Congress in the Social Security Act . . . should have much persuasiveness in any attempt to define (the same terms) under the National Labor Relations Act." *N.L.R.B.* v. *John W. Campbell, Inc.*, 159 F. 2d 184, 186.

[2] 49 Stat. 642 643, Sec. 907, 42 U.S.C.A. No. 1107.

[3] *Nierotko* v. *Social Security Board*, 327 U.S. 358, 365-366. The Supreme Court appended the following footnote, pertinent here, to the statement above quoted:

"For example the Social Security Board's Regulations No. 3 in considering 'wages' treats vacation allowances as wages, 26 CFR 1940 Supp., 402, 227 (b)."

Compare *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133, 65 S. Ct. 165, 168. Treasury Department Regulations No. 91 relating to the Employees' Tax under Title VIII of the Social Security Act, 1936, Art. 16, classifies dismissal pay, vacation allowances or sick pay, as wages. Regulations 106 under the Federal Insurance Contributions Act, 1940, pp. 48, 51, continues to consider vacation allowances as wages. It differentiates voluntary dismissal pay . . . In regulations governing the collection of income taxes on or after January 1, 1945, 58 Stat. 247, the Bureau of Internal Revenue classified vacation allowances and dismissal pay as wages under the following statutory definition of wages:

"Sec. 1621. Definitions. As used in this subchapter—

"(a) Wages. The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such terms shall not include remuneration paid . . ." See 26 CFR, 1944, Supp., 405, 101 (d) and (e)."

nexus between an employee's current compensation and his future pension benefits. Regardless of the particular economic considerations that may motivate the establishment of a pension system, the fact remains that the employer's financial contribution thereto, in whole or in part, on behalf of the employees provides a desirable form of insurance annuity which employees could otherwise obtain only by creating a reserve out of their current money wages or by purchasing similar protection on the open market. In substance, therefore, the respondent's monetary contribution to the pension plan constitutes an economic enhancement of the employee's money wages. Their actual total current compensation is reflected by both types of items.[10] Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected.[11] Indeed, the practice of offering retirement benefits in lieu of current wage increases is not uncommon in bargaining between employers and employees' representatives.

Moreover, as indicated above, in all fields of law dealing with Congressional legislation for the protection of public rights, the term "wages" has consistently been construed to

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[10] As is pointed out by the Trial Examiner in his Report, economists and experts in the field of labor relations concur in this view. Typical of this conclusion is the following statement:

"The payment of insurance of his workers assumed by an employer must be considered as an additional compensation for services rendered differing only in form of payment from the ordinary weekly wage." Lieberman, *The Collective Labor Agreement*, p. 132 (Harper Bros., 1939). See also, Z. Clark Dickinson, *Collective Wage Determination*, (Ronald Press, 1941), pp. 72-74.

Compare the decision of the First Circuit Court of Appeals in *Hackett* v. *Comm'r of Internal Revenue*, 159 F. 2d 121, where the Court held that premiums paid for by the employer for the purchase of employee annuity contracts were taxable as income to the recipient even though the employees had no right to receive cash instead of the annuity contract. The Court stated that the receipt of the annuity constituted an economic benefit conferred as additional compensation which is the equivalent of cash. See also *Hubbell* v. *Comm'r of Internal Revenue*, 150 F. 2d 516 (C.C.A. 6).

[11] Cf. *N.L.R.B.* v. *J. H. Allison Co.*, 165 F. 2d 766 (C.C.A. 6), enforcing 70 N.L.R.B. 377.

include increments, such as retirement benefits or other types of dismissal pay rights, which flow to employees because of their longevity. Thus, in exercising our statutory power under Section 10 (c) of the Act to "reinstate with back pay," we have, in effect, uniformly held that pension and other "beneficial" insurance rights constitute a part of the employees' real wages and have accordingly required restoration of those benefits as part of our make whole order. The Courts have approved.[12]

In the field of taxation, pensions and retiring allowances have regularly been taxed by the Treasury Department since 1918, as income to the recipients by application of the Internal Revenue Act definition of wages as "compensation for personal services." The validity of this construction of the Revenue Act by the Treasury Department has been expressly sustained by the courts.[13] One court decision, for example, uses

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[12] *Butler Brothers, et al.* v. *N.L.R.B.* 134 F. 2d 981, 985 (C.C.A. 7) enforcing 41 N.L.R.B. 843, 871; *N.L.R.B.* v. *General Motors Corp.*, 150 F. 2d 201 (C.C.A. 3), enforcing with modifications not here pertinent, 59 N.L.R.B. 1143, 1154, 1156. See also, *N.L.R.B.* v. *Stackpole Carbon*, 128 F. 2d 188, 191 (C.C.A. 3) where the Court, in commenting upon an order requiring restoration of insurance rights to the victim of an employers' discrimination, said: "This conclusion seems to us to be in line with the purposes of the Act, for the insurance rights in substance were part of the employee's wages."

The same principle, so far as the field of labor relations law is concerned, is given effect, *inter alia*, in decisions of the War Labor Board cited by the Trial Examiner at p. 7, and note 11 of the Intermediate Report; in the *Basic Steel* case, in which respondent was a party, 19 W.L.B. 568, 572; in the decision of a labor arbitrator, *In Re Fifth Avenue Coach Co.*, 4 Labor Arbitration Reports, 548, 562; and in the definitions of dismissal compensation made by the *U. S. Bureau of Labor Statistics*, Bulletin No. 686, p. 71; Bulletin No. 808, p. 2. See, also our decision in *Matter of C. B. Cottrell & Sons Co.*, 34 N.L.R.B. 457, 469-470.

[13] *Hooker* v. *Hooey*, 27 F. Supp. 489, 490 (Dist. U.S.D.N.Y.), affirmed *per curiam* on opinion of District Court, 107 F. 2d 1016 (C.C.A. 2). Cf. *Lincoln Electric Co.* v. *Commissioner*, 162 F. 2d 379 (C.C.A. 6) (insurance premiums paid by an employer on an employee retirement plan held to be "ordinary and necessary expenses" within meaning of Internal Revenue Act and as such, deductible for income tax purposes). Compare, also, the following cases interpreting various kinds of employer provisions as being "compensation for personal services" for tax purposes: *Commissioner* v. *Smith*, 324 U.S. 177; *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U.S. 716; *Hackett* v. *Commissioner of Internal Revenue*, 159 F. 2d 121 (C.C.A. 1); *Hubbell* v. *Commissioner of Internal Revenue*, 150 F. 2d 516 (C.C.A. 6); *Obermuller* v. *Commissioner of Internal Revenue*, 147 F. 2d 255 (C.C.A. 8); *Vanneck*

the following pertinent language (*Hooker* v. *Hooey*, *supra* note 13, 27 Fed. Supp., at p. 490): "A pension is a 'stated allowance or stipend made in consideration of past services on the surrender of rights or emoluments to one retired from service,' Webster's new International Dictionary. It cannot be doubted that pensions of retiring allowances paid because of past services are one form of compensation for personal service and constitute taxable income."

Likewise in the administration of the Bankruptcy Act provisions for the award of priorities to "wages . . . which have been earned" up to certain sums,[14] a Federal Court, sitting in equity, felt impelled by the economic foundation of the doctrine of dismissal or severance pay, to hold that such dismissal pay obligations accruing out of a collective bargaining contract, constituted "wages," entitled to the same priorities as other wage claims.[15]

The Trial Examiner found that the pension plan constituted a "condition of employment" as to which collective bargaining is obligatory under the Act. The respondent concedes that the retirement rule, which compels severance of the employment relation at the age of 65, affects tenure of employment, but contends that the Act does not compel bargaining on such matters. The burden of the respondent's argument is that the term "conditions of employment" has no broader meaning than that perhaps spontaneously suggested by the term "working conditions," and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn.

We believe, however, that the express definitions of the Act itself and the controlling judicial and other authoritative interpretation of the Act, render the respondent's contention without merit.

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v. *Allen*, 158 F. 2d 467 (C.C.A. 5); *Wilkie* v. *Commissioner of Internal Revenue*, 127 F. 2d 953 (C.C.A. 6); *Levey* v. *Helvering*, 68 F. 2d 401 (App. D.C.). See also *George A. Fuller Co.* v. *Brown*, 15 F. 2d 672; *Robert* v. *Mays Mills*, 114 S.E. 432, for discussion of general principles here pertinent.

[14] Sec. 64, sub. a (2) of the Bankruptcy Act, 11 U.S.C.A., No. 104, sub. a (2).

[15] *In re Public Ledger*, 161 F. 2d 762 (C.C.A. 3).

A synthesis of the definitions in Section 2 (4), (5), and (9) of the Act and the reasonable implication of the proviso to Section 8 (3), viewed in relation to Section 8 (5), compel the conclusion, and we find, that matters affecting tenure of employment, like the respondent's retirement rule, lie within the statutory scope of collective bargaining." Any other view would remove bargaining with respect to such matters as seniority and union security provisions from the conference table to the picket line." Indeed, the Supreme Court has specifically held that the statutory scope of collective bargaining extends to matters involving discharge actions." Significantly, Senator Wagner, in addressing the 80th Congress with respect to the 1947 amendatory legislation, recently stated that the term "condition of employment" as used in the original act was intended to have a broader meaning than "working conditions" and included such subjects as "pension plans, and insurance funds which properly belong in the employer-employee relationship . . ." (93 Congressional Record 3427).

Respondent would nevertheless have us employ the more restrictive construction of the Act it has proposed because, allegedly, there is evidence in the legislative and historical background of the Act requiring the inference that exclusion of such plans from the area of obligatory bargaining was specifically intended by the 74th Congress, and further, because effective contractual regulations of the terms of such complex schemes as the one here involved could not, as a practical matter, be achieved, within the settled framework of collective bargaining through fixed units and short-term contracts.

The respondent's claim that evidence of exclusion of the kind of group insurance schemes here involved can be found in the legislative background of the Act rests upon certain

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" The Report of the Senate Committee on Education and Labor on the Act pointed out that the broad phraseology of Section 2 (5) of the Act was deliberately framed "to extend to all organizations of employees that deal with employers in regard to 'grievances' and 'labor disputes'," the guarantee of Section 7 and the protection of Section 8. *Report No. 573* on S. 1958, 74th Cong., 1st Sess. (1935), at p. 7.

" These matters form a substantial part of the historical picture of bargaining demands customarily proposed or achieved by unions as part of collective bargaining.

" See *National Licorice Co. v. N.L.R.B.*, 309 U.S. 360-361.

contemporaneous statements made by Senator Wagner and the Senate Committee on Education and Labor regarding industry-supported pension and insurance schemes. These framers of the Act told Congress that the provisions of the Act were deliberately drawn, insofar as pension and other group insurance schemes were involved, with two objectives in mind: (1) to include the discriminatory undertaking by employers of the support of pension or other welfare insurance plans, or the discriminatory application of the terms of such plans, within the reach of the statutory prohibitions; and (2) to include nothing in the Act which would hamper or otherwise restrict the then growing tendency [*] of employers to institute or contribute to such plans.[**] The first objective was

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[*] Support for such employee benefit schemes had then been assumed in some cases at the request of organized employee agencies whose functions were not confined solely to representing employees in bargaining, but also included the administration of various types of welfare funds. The employer's undertaking was frequently incorporated into the collective contract. See, e.g., as to the unemployment insurance plan contracted for by various national unions representing employees in the clothing and other well-organized industries: *U. S. Bureau of Labor Statistics*, Bull. No. 393, pp. 51, 52, 55. (Trade Agreements 1923, 1924); Bull. No. 448, pp. 69, 78-80 (Trade Agreements 1925); Bull. No. 448, pp. 70-71, 78-79 (Trade Agreements 1926); Bull No. 468, p. 71; Bull. No. 491, pp. 701-703 (Handbook of Labor Statistics, 1929 Ed.); Bull. No. 541, pp. 673-675 (Handbook of Labor Statistics, 1931 Ed.); Bull. No. 616, pp. 816-818 (Handbook of Labor Statistics, 1936 Ed.); as to the life insurance and sickness and pension benefit plans contracted for by various locals of the Amalgamated Association of Street and Electric Railway Employees and by the International Brotherhood of Electrical Workers: *U. S. Bureau of Labor Statistics*, Bull. No. 541, pp. 383-385 (Handbook of Labor Statistics, 1931 Ed.); Monthly Labor Review, Vol. 30 (Feb. 1930) pp. 10-12 (Life Insurance and Old Age Pensions Established by Collective Agreement); as to establishment and administration of group benefit schemes through employer-employee organizations of one company, generally, see *U. S. Bureau of Labor Statistics*, Bull. No. 634, pp. 63-64 (Characteristics of Company Unions, 1935); see also the testimony of various unaffiliated one-company union representatives at the hearing on the bill before the Senate Committee on Education and Labor (74th Cong., 1st Sess.) at pp. 284-286, 298-303, 398, 415.

[**] The Report of the Senate Committee on Education and Labor on the 1935 Act (Senate Report No. 573, on S. 1958, 74th Cong., 1st Sess., p. 10) articulates the legislators' concern with this problem as follows:

"This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limit of one company. Nor does anything in the bill interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies and the like, so long as such organizations

accomplished by the drafting of the provisions of Section 8 (2) and 8 (3) of the Act; the second by the specific enumeration in Section 2 (5) of the type of employee-organization functions which the Congress desired should be free of employer domination or control. In other words, the legislative history relied on by the respondent was developed in connection with Section 8 (2) of the original Act; and it indicates no more than that Congress desired to assure employers that their contribution to an organization administering a pension plan would not be considered unlawful under Section 8 (2) of the Act provided such organization did not otherwise come within the definition of Section 2 (5) of the Act and that the administration of such plan was not designed to discourage or encourage membership in a bona fide labor organization.

We find nothing in these statements of the proponents of the Act about industrial insurance schemes which negatives the subsumption of the monetary or other aspects of employee insurance schemes under a broad interpretation of "wages" or "conditions of employment" or which evidences Congressional adoption of the narrower sense of these terms.

Respondent also contends that the absence of a general practice of collective bargaining with respect to pension or other similiar social insurance schemes before 1935 supports its position that bargaining within the meaning of the Act does not include such matters. In support of this position, the respondent relies upon the Supreme Court's statement in the *Railroad Telegrapher's* case[*] that the Act is generally "considered to absorb and give statutory approval to the philosophy

do not extend their functions to the field of collective bargaining, and so long as they are not used as a covert means of discriminating against or in favor of membership in any labor organization. Such agencies, confined to their proper sphere, have promoted amicable relationships between employers and employees and the committee earnestly hopes that they will continue to function."

To the same effect, see Senator Wagner's statement on this and a predecessor bill at 78 Cong. Record, 3443-3444; 79 Cong. Record, 2371-2372, 7570; and at p. 15 of the record of the hearings on the bill held by the House Committee on Education and Labor, and on p. 41 of the hearings on the bill held by the Senate Committee on Education and Labor (74th Cong., 1st Sess).

[*] *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346.

of bargaining as worked out by the labor movement in the United States." However, this principle, as used by the Supreme Court in that very case, offers no support for the respondent's position. The Supreme Court there states that statutory collective bargaining includes bargaining "about the exceptional as well as routine" matters affecting wages, hours, and other conditions of employment and that collective bargains "need not and do not always settle or embrace every exception" (321 U.S., at p. 347). In our opinion the Supreme Court implicitly recognized that the general scheme of bilateral negotiation was the means contemplated by the Act to adjust any difference between employers and employees arising directly out of the employment relationship, and that this means—collective bargaining—was to be used irrespective of the fact that the specific difference to be adjusted had not previously been regularly considered in the framing of collective bargains." This view is not only consistent within, but is supported by, the fact that Congress, in seeking to promote industrial peace through collective bargaining, did not attempt to catalog all the various matters which might give rise to industrial strife, absent the ameliorating influences of the bargaining process.

In any event, we are convinced, and we find that the historical pattern of collective bargaining with respect to social insurance plans, whatever it be," affords no reasonable basis

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" See also, *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 45, where the Supreme Court says, "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel."

" It is unreasonable to expect that, prior to 1935, unions would have been able to negotiate effectively for any thing more than the establishment of the routine terms of wages, hours, and conditions of employment, because the failure of most employers voluntarily to accept the processes of collective bargaining placed most unions in a weak position.

Nevertheless, so far as facts can be assembled about the bargaining platforms of unions at that time, it plainly appears that at the bargaining table, unions approached the problem of bargaining for the protection of employees against the hazards of unemployability both directly, in seeking financial benefit provisions in the collective contract, and indirectly, by seeking measures designed to protect against the industrial causes of ill health, premature ageing and insecure employ-

for supplying a Congressional intent to exclude such plans from the ambit of obligatory bargaining."

Nor do we believe, as contended by the respondent, that contractual regulation of the terms of pension plans cannot, as a practical matter, ever be achieved within the settled framework of collective bargaining. As the Supreme Court has recently recognized, the terms of employer support of complex beneficial programs of the type here involved "normally constitute the subject matter of collective bargaining," *United States* v. *United Mine Workers of America*, 67 S. Ct. 677, 693, and are demonstrably adaptable to the trade union agreement device." There is no question that the bargaining task is a more difficult one where, as is the case with respond-

ment. See e.g. the authorities cited *supra*, at footnote 19, and those cited by the Trial Examiner at page 8 of the Intermediate Report, footnotes 12, 13, and 14. See also the following: *U.S. Bureau of Labor Statistics* Bull. Nos. 393, pp. 3, 5, 9, 11, 13, 14, 15, 20, 33, 34, 37, 38, 42, 59, 60, 64, 67, 68, 70, 71, 74, 81, 94-95, 106, 110, 118, 123, 126 (Trade Agreements, 1923, 1924); Bull. No. 419, pp. 5-6 (Trade Agreements, 1925); Bull. No. 448, p. 8 (Trade Agreements, 1927); Bull. No. 491, pp. 476, 480 (*Handbook of Labor Statistics* 1929 Ed.); *The Report of the Convention Proceedings of the A.F.L.* (1929, pp. 48-51, 288-290); (1930, p. 83); (1933, pp. 93-94, 111); (1934, pp. 117-118); (1935, p. 41); and the various summaries of trade union agreement provisions in the Labor Department's Monthly Labor Reviews during the period from 1930 through 1935.

" Respondent further argues that the *Heinz* case (*H. J. Heinz Company* v. *N.L.R.B.* 311 U.S. 514) requires that Board to limit the scope of the statutory obligation to bargain to matters which historically had been encompassed in the practice of collective bargaining as known at the time the Wagner Act was passed. That argument is based upon the mistaken assumption that the *Heinz* case and this case present analagous situations. There the Board and the Court were required to decide whether *signed contracts* historically were part of the *technique* of collective bargaining in order to determine whether Congress intended to import an obligation to make signed contracts into the Act, as part of the statutory obligation to bargain collectively, the Act having been silent on that question. But here Congress specified the *subject-matters* on which collective bargaining was required, including "wages" and "conditions of employment."

" See, *inter alia*, *U. S. Bureau of Labor Statistics Bulletins* cited in footnote 19, *supra*, Bulletin No. 686 (Union Agreement Provisions, 1942) pp. 194-201; The Department of Labor Publication, *Monthly Labour Review*, February 1947, pp. 141-214 ("Collective Bargaining Development in Health and Welfare Plans"); the study made by Baker and Dahl, *Group Health Insurance and Sickness Benefit Plans in Collective Bargaining* (Princeton Univ., 1945), and the study made by Robert J. Rosenthal, *Union-Management Welfare Plans*, pp. 64-94 of Quarterly Journal of Economics, November 1947 (Harv. Univ.).

ent, the actual negotiations may revolve around an operating pension insurance scheme covering employees variously represented in many units. But, as the Trial Examiner points out, the difficulties in such a case go to the question of what terms may be agreed upon practically in the course of bargaining, rather than to the question of whether any bargaining at all can take place.

Because the acts of the respondent, upon which the charge of unfair labor practices was based, occurred before August 22, 1947, when the statute was amended by the present Congress, we have so far only discussed the application of the original statute. The complaint, however, alleges, and the Trial Examiner has found, that respondent is *continuing* to engage in unfair labor practices; and the legal validity of this finding has also been placed in issue by the respondent. We must therefore determine whether, in reenacting and amending the statute, the present Congress either narrowed or broadened the scope of collective bargaining as conceived in 1935.

There is compelling evidence in the legislative history of the amended Act that the 80th Congress recognized that pension and retirement plans and other similar "welfare insurance" schemes fell within the meaning of the terms "wages or other conditions of employment" as written in 1935, and that it was willing to allow that conclusion to stand.

Thus, in the original bill introduced in the Senate by Senator Ball (S. 360, 93 Cong. Rec. 629), the phrase "other working conditions" was substituted for the phrase "other conditions of employment" which originally appeared in the Act. The distinction between the two phrases was discussed by various witnesses who appeared before the Senate Committee in charge of the bill. On this occasion, the Board's witness, in opposing the proposed change, stated:*

> "This might easily be construed to withdraw statutory protection from or to forbid bargaining with respect to pension plans, fines for work stoppages, welfare funds, use of union-labeled goods, hiring hall arrangements and other matters frequently not considered working conditions."

* Hearings before the Committe on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. (1947), p. 1914.

On April 11, 1947, Senator Wagner brought this fact to the attention of the Senate in a statement in which he pointed out (93 Cong. Rec. 3427):

> By substituting the narrower term "working conditions" for the present broader term "conditions of employment" the bill would narrow the scope of collective bargaining to exclude many subjects such as, perhaps, pension plans and insurance funds which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism.

The ensuing debate led to a *deletion* of the proposed words of limitation from the final bill that Senator Taft reported to the Senate on April 17, 1947 (S. 1126). In it, the phrase "conditions of employment" reappeared. It remained in the bill which eventually became the Act, as amended.

The original bill passed by the House and sent to the Senate (H. R. 2030; 93 Cong. Rec. 3747) excluded insurance and welfare plans from the scope of collective bargaining. The bill limited collective bargaining to:

> (i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures and practices governing safety, sanitation, and protection of health in the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects *(ibid)*.

On April 17, 1947, Representative Lodge offered an amendment to this section of the pending bill which would broaden its narrow definition of collective bargaining to include,

> "pension plans, group insurance benefits, and hospitalization benefits." (93 Cong. Rec. 3712.)

In support of his amendment, Representative Lodge stated *(ibid.)*:

> . . . The purpose of this amendment is to minimize the interferences with collective bargaining which are implicit under the section to which this amendment applies. I regard such interferences with collective bargaining by the Government as unwarranted. These matters should be left for negotiation between labor and management.

Representative Madden, who spoke in favor of the amendment, stated *(ibid.)*:

> Bargaining on this type of welfare system is completely within the area of appropriate collective bargaining under the present provisions of the Act.

Representative Lodge's amendment was defeated (93 Cong. Rec. 3713). But the restrictive definition of collective bargaining contained in the original House bill was *eliminated* in the Senate-House Conference bill which passed the House on June 4, 1947 (93 Cong. Rec. 6549).

The language and the legislative history of Section 302 of the Act also reveal Congressional recognition of the demonstrable adaptability of the collective bargaining process to the establishment or control of industry-supported welfare schemes. It further discloses Congressional affirmation of the inclusion of such schemes within the statutory scope of collective bargaining.

Section 302 restricts employer payments to employee representatives. The proviso to subsection (c) of Section 302, however, permits, subject to various conditions, employer contributions to joint employer-union administered trust funds set up for the purpose of providing medical care, pensions and insurance for employees and their families. Congress recognized that many such funds had already been established by collective agreement prior to 1947 and accordingly, to prevent a retroactive application of the restrictions of Section 302 to funds already established, Congress provided in subsection (f) that Section 302 would not apply to any contract in force on the date of enactment of the Act, until the expiration of such contract or until July 1, 1948, whichever first occurred. In subsection (g) of Section 302, Congress further provided:

> Compliance with the restrictions . . . upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by *collective agreement* prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. (Italics supplied.)

We conclude, therefore, as did the Trial Examiner, that where, as here, the employes in an appropriate unit have designated an exclusive bargaining representative, the employer of such employees is under a statutory duty to bargain collectively with the accredited representative concerning the terms of a pension and retirement program.

B. The respondent's alleged justification of its refusal to bargain with the Union.

The respondent seeks to justify its failure to notify and to consult with the Union about the expansion of its pension undertaking in December 1945, and its refusal to entertain the Union's grievance about the application of the retirement rule and its effect upon the contract terms on more than its erroneous conception of a limited obligation under the Act. It also relies on the "management rights" clause in the contract and the Union's failure, when the collective contract was negotiated, either to protest or otherwise to seek to qualify the effect of the respondent's first expansion of the retirement insurance program. In other words, the respondent here asserts that the Union waived its right to negotiate about the pension plan or to protest any unilateral decisions as to the operation or scope of benefits of the pension-retirement program, at least for the duration of the contract.

The contract contained no specific waiver. The most that can be assumed from the Union's failure during the contract negotiations to bargain or affirmatively to evince an interest in the immediate negotiation of the retirement program, is that the Union acquiesced in the program as it existed before, and carried over that program into the contract year. Such "acquiescence," however, was given at a time when the separation-because-of-age policy was effective, if at all, only on a case-to-case basis, and when the Union contemplated subsequent negotiation—specifically delayed because of wartime conditions—of a severance pay structure that would undoubtedly have required the discussion of the retirement benefits then existing.[7] We cannot view this kind of "acquiescence"

[7] In the *Basic Steel* case, 19 W.L.B. 568 (in which the respondent and Union were parties) one of the issues submitted to the War Labor Board concerned the inclusion in collective agreements between em-

as constituting a waiver of the Union's right to insist on the maintenance of the *status quo* as it existed at the time of the contract, or of its right to seek an opportunity to bargain about reshaping the contractual relationship to the new economic conditions. Moreover, if respondent, in fact, had believed that the contract clauses or the Union's "acquiescence" relieved it from an obligation to recognize the Union's demands during the contract period, the merits of its position could have been established through the adjudicative procedure under the contract which the Union here sought to invoke.

As is pointed out more fully in the Trial Examiner's Intermediate Report, the Union, upon hearing of the respondent's unilateral determination to apply the separation-because-of-age policy on an automatic, rather than on a case-to-case basis, immediately sought to invoke the *grievance procedure*, claiming that automatic application of the policy was violative of the seniority and discharge notice provisions of the contract. The respondent foreclosed the use of the grievance procedure or any other avenue of approach to it by announcing to the Union that important legal issues were involved which would have to be presented to the Board. The Union later discovered that respondent had also acted unilaterally in expanding its financial obligations under the pension pro-

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ployers in the basic steel industry and various locals of the United Steelworkers of America (CIO) of a severance pay structure designed, in part, to provide a monetary income for steelworkers who would become displaced at the time industrial operations would be reconverted from a wartime to a peacetime basis.

The War Labor Board, although declining to approve the severance pay structure submitted by the Union, approved the principle, and ordered the parties to negotiate within 60 days following the issuance of the directive order, for "reasonable" severance pay allowances appropriate for each plant through the procedures of collective bargaining. The directive order issued November 25, 1944, contained the following language (19 W.L.B. at 572) which was incorporated in the collective agreement of April 1945 together with a specific clause stating that the parties would negotiate about the matter at a later unspecified date:

Among the provisions which should be worked out through collective bargaining are those relating to the eligibility of employees, the amount of severance pay benefits, the circumstances under which the benefits should be paid, the transfer of employees to other suitable employment, the *relation to existing pension and retirement plans*, etc. (Emphasis supplied.)

gram so as to provide insuring benefits to employees without cost to them.

In any event, it is clear to us from the record that respondent failed and refused to bargain with the Union respecting the interpretation of the contract and the substantive matters of the pension program, and is continuing to fail and refuse to do so, because of its fixed view that the establishment and operation of such a program is a management function outside the scope of the collective bargaining rights granted employees under the Act. This is borne out by the oral argument in the instant case, where respondent's counsel asserted that the respondent had taken "great pains to avoid any discussion whatever at any collective bargaining meetings" concerning its pension and retirement policies, "and would have done so whenever the [Union] had brought it up, and will continue to do so until we are required to do otherwise." Thus, whether or not the contract in fact permitted respondent to refuse to bargain about the pension and retirement policies during its term is largely academic.* Moreover, that contract has since expired.

We find, as did the Trial Examiner, that the respondent has engaged, and is engaging in, violations of Section 8 (5) and (1) of the Act.

The Remedy

Because the respondent has rigidly maintained, and is maintaining that its pension and retirement policies are not the subject of collective bargaining, but are a matter about which the respondent is free to act unilaterally, and because, as we have found, the respondent's unilateral action with respect to any aspects of its pension and retirement plan substantially affect the interest of the exclusive representative in the establishment of stable terms and conditions of employment ap-

* Even if we were to assume that, as the respondent contends, the contract gave respondent the privilege of dealing unilaterally with any aspect of its pension and retirement program during the term thereof, we are nevertheless convinced and find that the respondent's admitted rejection of the principle of collective bargaining as to pensions on grounds other than the contract is violative of the Act, in that it foreclosed bargaining for any agreement with respect to its pension policy, irrespective of the time at which such agreement might become effective.

plicable to the entire group, we find it necessary, in order to effectuate the policies of the Act, to require the respondent to refrain from making any unilateral changes with respect to its pension and retirement policies which affect any of the employees in the unit represented by the Union, without prior consultation with the Union; and in addition, to require it to bargain collectively with the Union upon request.

We agree with the Trial Examiner that it is not necessary, in order to effectuate the policies of the Act, to require the respondent to reinstate the retired employees with back pay. The merits of the Union's request for such reinstatement may well be determined through the procedures of collective bargaining which our order here assures the Union it may use, upon its meeting the conditions specified below.

The Union has not complied with the provisions of Section 9 (f), (g), and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein.[*]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the Act, as amended, the National Labor Relations Board hereby orders that the respondent, Inland Steel Company, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO),[**] with respect to its pension and retirement policies if and when said labor organization shall have complied within thirty (30) days from the date of this Order, with Section 9 (f), (g), and (h) of the Act, as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the respondent's Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office and salaried employees, brick-

[*] *Matter of Marshall Brice Company*, 75 N.L.R.B., No. 13.

[**] Hereinafter called "the Union."

layers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;

(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above, bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post in conspicuous places throughout its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached hereto marked Appendix A.[*] Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for thirty (30) consecutive days thereafter and also for an additional thirty (30) consecutive days in the event of compliance by the Union with the filing requirements of the Act as amended, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Thirteenth Region in writing, within ten (10) days from the date of this Order, and again within ten (10) days from the future date, if any, on which the respondent is officially notified that the Union

[*] In the event that this Order is enforced by a decree of a circuit court of appeals, there shall be inserted before the words "A Decision and Order" the words "Decree of the United States Circuit Court of Appeals Enforcing."

has met the condition hereinabove set forth, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 12th day of April 1948.

Paul M. Herzog
Chairman

John M. Houston
Member

James J. Reynolds, Jr.
Member

Abe Murdock
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

J. COPELAND GRAY, MEMBER, dissenting:

I dissent from the Order of the Board directing the respondent to bargain on a retirement program. I strongly believe that neither employers nor unions should be *required* by this Board to bargain collectively on a subject matter which has *not* become an industry or general business practice.

Research has disclosed no real practice of collective bargaining on retirement programs. Such statistics as are available on the subject, show that the installation of retirement programs is a management prerogative.[*] In fact, in the instant case the respondent on its own initiative voluntarily planned and installed the retirement program in issue in 1936 and extended it in 1944, without any complaint at that time and for some time thereafter by the then existing duly constituted collective bargaining representative.

Contrary to the assertion in the opinion of the majority, there is no commonly known "practice of offering retirement benefits in lieu of current wage increases." The few isolated cases in which an employer *voluntarily* offered some retire-

[*] In the approximately less than 5 percent of the industries covered, retirement programs have been generally unilaterally installed by employers. See, e.g., Survey by N.I.C.B. for Associated Industries of New York State in 1947; "Group Health Insurance and Sickness Benefit Plans in Collective Bargaining" by the Industrial Relations Section of Princeton University; and a recent study by the Bureau of National Affairs, Inc.

ment benefits as a *quid pro quo* for a union's concession on wage increases, can by no stretch of the imagination be construed as a "not uncommon practice." Indeed, union leaders themselves must have regarded retirement programs as falling outside the scope of collective bargaining. Thus, this is the first case involving an employer's duty to bargain on the subject to come before the Board since the passage of the Wagner Act in 1935. During the days of the War Labor Board, when union leaders extended their ingenuity to devise many types of fringe benefits to by-pass the "Little Steel Formula," which prohibited wage increases beyond 15 percent,[24] there were no general demands for retirement programs. If ever the time were ripe for unions to attempt to secure such benefits for their members through *compulsory* collective bargaining, it was when the War Labor Board was inclined to grant or to require collective bargaining on these fringe additions. Yet the union leaders and rank and file employees did not at this most propitious time generally think of retirement programs as a required subject matter for collective bargaining.[25] And, as previously noted, in this very case the Union made no collective bargaining demands at the time when the respondent extended the retirement program and for some time thereafter.

That neither employers nor unions have regarded retirement programs as a *compulsory* subject for collective bargaining generally, is readily understandable from the complexities and confusions which would inevitably result from such a step. Let us assume the case of an employer who has contracts with five different unions covering different units of employees in the plant. The representatives of the five unions will be vying to outdo each other in the liberality of any retirement program under consideration. Add to this the lack, common to most people, of the specialized and technical knowledge of the actuarial requirements for sound retirement programs. Such conditions could only create chaos in the bargaining process.

[24] Among the fringe benefits obtained were increased vacation pay, increased or initial night shift premiums, increased or initial pay for holidays not worked, and increased or initial pay for recesses.

[25] Retirement programs should not be confused with dismissal pay, which is an entirely different type of grant.

Or, take for example, the employer who has already established a sound retirement program pursuant to collective bargaining with a union. At the end of the contract year, he may be faced with a demand by the same or a different bargaining agent to change the entire program, thereby completely upsetting the actuarial basis upon which the program had been planned. Demands for changes could continue at the end of each contract term. No business can function soundly on such a basis. These examples illustrate how impractical and infeasible it is to require collective bargaining concerning retirement programs *as a matter of law*.

I do not agree with the majority that, in enacting the Wagner Act, Congress intended to include retirement programs within the phrase "wages, hours, and working conditions," by its mere failure specifically to exclude it. In attempting to ascertain the Congressional intent *as it existed in 1935*, we must also consider the prevailing practice or lack of it with respect to retirement programs and the feasibility of bargaining collectively with respect to it. As I have already pointed out, there is not now, and certainly there was much less in 1935, any established practice of bargaining collectively for retirement programs and that such a practice was highly impractical and unworkable. In the light of the foregoing, I can only conclude that the Congress used the words "wages, hours, and working conditions" in the then existing normally accepted common usage of the terms. That did no include retirement programs.

In my view, the right of the employer to fix the age at which he may end the active employment of his employees, is just as much a prerogative of management as is his right to fix the age above the legal minimum at which he will hire people to work for him. Concededly, the establishment of a retirement program is a constructive step which may produce many benefits for the employees and the employer by way of reduced turnover, improved employee morale, and employer satisfaction that his superannuated employees will acquire some benefits. But our concern here is not to determine whether such objectives are desirable. If an employer, on his own initiative or pursuant to peaceful persuasion by a union, desires

to bargain with the union concerning the establishment of a retirement program, there is nothing to prevent him from doing so. I do not believe, however, that this Board is required to, and should, so interpret the statute as to *compel* the respondent to bargain on this subject matter.

I would dismiss the complaint.

Signed at Washington, D. C., this 12th day of April 1948.

J. Copeland Gray

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees

WE WILL NOT refuse to bargain collectively with Local Unions Nos. 1010 and 64 of the United Steelworkers of America (CIO), as the exclusive representative of all of the employees in the bargaining unit described herein with respect to our pension and retirement policies, provided said labor organization complies, within thirty (30) days from the date of the aforesaid Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

WE WILL NOT make any unilateral changes in our pension and retirement policies affecting any employees in the bargaining unit without prior consultation with the Union, provided said labor organization complies within thirty (30) days from the date of the aforementioned Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

The bargaining unit is: all production, maintenance and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

INLAND STEEL COMPANY
(Employer)

Dated ..... By .....
(Representative) *(Title)*

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TRIAL EXAMING DIVISION
WASHINGTON, D. C.

Case No. 13-C-2836

In the Matter of
INLAND STEEL COMPANY
and
LOCAL UNIONS NOS. 1010 and 64, UNITED STEELWORKERS OF AMERICA (CIO)[1]

Mr. Herman J. De Koven, for the Board.

Pope & Ballard, by *Mr. Ernest S. Ballard*, and *Mr. Merrill Sheppard*, of Chicago, Ill., and *Mr. William G. Caples*, of Chicago, Ill., for the Respondent.

Mr. Frank J. Donner, of Washington, D. C., for the Union.

INTERMEDIATE REPORT

Statement of the Case

Upon a second amended charge filed on August 15, 1946, by United Steelworkers of America, on behalf of Local Unions Nos. 1010 and 64, herein called the Union, the National Labor Relations Board, herein called the Board, by its Acting Regional Director for the Thirteenth Region (Chicago, Illinois), issued its complaint dated August 19, 1946, against Inland Steel Company, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5), and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing thereon were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that the respondent: (1) on December 31, 1945, put into effect a "past-service pension trust" plan

[1] The correct name of the Union is as set forth above, in accordance with a stipulation of the parties.

for its employees, without first notifying and consulting with the Union and giving the Union an opportunity to bargain collectively concerning said pension trust plan, although a majority of the employees in an appropriate unit had designated and selected the Union as their representative for the purposes of collective bargaining; (2) on March 5, 1946, and thereafter, refused and failed to negotiate with the Union concerning a grievance presented by the Union, in which the Union protested the respondent's contemplated action of retiring employees in the unit who had reached age 65, and in which the Union stated that such action would constitute a breach of the existing contract between the respondent and the Union; (3) since on or about April 1, 1946, has retired employees in the unit who have reached age 65, and accorded them the right to receive certain benefits as retired employees, without first consulting with the Union and giving the Union an opportunity to bargain collectively concerning such matters; and (4) by the foregoing acts, has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The respondent, in its answer filed August 30, 1946, in effect admitted the allegations of the complaint as set forth above, alleged certain additional facts in relation thereto, and denied that by reason of any of such facts it had engaged in or was engaging in any unfair labor practices.

Pursuant to notice, a hearing was held on September 12, 1946, at Chicago, Illinois, before the undersigned, Sidney Lindner, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented at the hearing by counsel. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. Toward the close of the hearing a motion of counsel for the Board to conform the pleadings to the proof was granted without objection. At the close of the hearing counsel for the Board and for the Union argued orally before the undersigned. Although advised of their opportunity to file a brief, or proposed findings and conclusions of law, or both,

only counsel for the respondent filed a brief with the undersigned.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The business of the respondent

Inland Steel Company, a Delaware corporation, maintains the principle office and place of business at Chicago, Illinois, and operates and maintains in addition to others, plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, which plants are herein collectively called the Plants. At its Indiana Harbor plant the respondent is engaged in the manufacture, sale, and distribution of semi-finished and finished steel products, pig iron, and coke. At its Chicago Heights plant the respondent is engaged in the manufacture, sale and distribution of merchant bars, concrete reinforcing steel bars, and steel fence posts.

The respondent, in the course and conduct of its business and in the operation of the Plants, annually purchase raw materials for use at the Plants valued in excess of $5,000,000 of which more than 95 percent is shipped to the Plants from points outside the States of Indiana and Illinois. The respondent, in the course and conduct of its business and in the operation of the Plants, annually manufactures products at the Plants valued in excess of $5,000,000, of which more than 75 percent is shipped to points outside the States of Indiana and Illinois. The respondent concedes that in its operation of the Plants, at all times material herein, it has been engaged in commerce within the meaning of the Act.

II. The organization involved

Local Union Nos. 1010 and 64, United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent at its Plants.

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[1] After the receipt of the respondent's brief, counsel for the Board made a motion to be granted the right to file a reply brief. The motion was denied by the Chief Trial Examiner.

III. The unfair labor practices

A. The refusal to bargain

1. The appropriate unit and representation by the Union of a majority therein

The undersigned finds in accordance with the stipulation entered into by and between the parties, that all production, maintenance, and transportation workers employed by the respondent at its Plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

The undersigned further finds in accordance with such stipulation that Local Unions Nos. 1010 and 64, Steel Workers Organizing Committee, affiliated with the CIO, was certified by the Board on August 26, 1941, as the exclusive representative of the employees in the unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment,[1] and it remained such exclusive representative of the employees in the unit until succeeded by the Union on May 23, 1942, the date on which Steel Workers Organizing Committee changed its name to United Steelworkers of America. That at all times since May 23, 1942, the Union has been the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate bargaining unit, and that by virtue of Section 9 (a) of the Act, the Union was on May 23, 1942, and at all times thereafter has been and is now the exclusive representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

There are no contested material issues of fact in this proceeding. The respondent does not deny that it failed and refused, and fails and refuses, to discuss with the Union the several matters embraced by the allegations of the complaint.

[1] 31 N.L.R.B. 1294.

It defends its conduct in this respect on the grounds that the establishment of its Retirement Plan and Past Service Pension Trust Plan, collectively herein referred to as the Pension Plan, and the termination of employees pursuant to the terms of the Pension Plan are not proper subjects for collective bargaining; and that a so-called "management" clause in the current contract between the respondent and the Union has the effect of vesting exclusively in the respondent the right to establish a fixed retirement age, and to retire employees pursuant thereto.[1]

The respondent's original Retirement Plan for its employees and the employees of its subsidiaries was put into effect on January 1, 1936, by the establishment of a contributory plan for the payment of retirement annuities pursuant to a contract between the respondent and the Equitable Life Assurance Society of the United States. Those eligible to participate in the original Retirement Plan were employees with earnings of $250.00 or more per month, and membership in the plan was optional.

At the time the original Retirement Plan was put into effect, no collective bargaining agent had been certified at the Plants for the employees in the unit, and there had been no collective bargaining by the respondent with any representative of these employees. The first collective bargaining contract between the respondent and the Union was entered into on August 5,

[1] This contract which was entered into by the parties on April 30, 1945, and amended February 16, 1946, recognized the Union as the exclusive bargaining representative of the employees in the unit heretofore found to be appropriate. The clause in question reads as follows:

Article XI

Plant Management

The management of the plants and the direction of the working forces, including the right to direct, plan and control plant operations, the right to hire, promote, demote, suspend, and discharge employees for cause, and to relieve employees because of lack of work or for other legitimate reasons, and the right to introduce new and improved methods or facilities, and to change existing production methods or facilities and to manage the properties in the traditional manner, is vested exclusively in the Company, provided that nothing shall be used for the purpose of discrimination against employees because of membership in or activity on behalf of the Union. These provisions shall not apply to nullify the other provisions of this agreement.

1942. It provided for recognition of the Union as exclusive bargaining representative, a maintenance of membership clause with an escape period, and numerous other provisions with regard to wages, hours of work, vacations, and other matters not material here. No mention was made of the Retirement Plan in this contract.

On December 31, 1943, the Retirement Plan was amended and extended to cover all employees, regardless of the amount of their earnings, provided the employees who elected to participate in the plan had 5 years of service with the respondent or one of its subsidiaries, and had attained the age of 30.[4]

On April 30, 1945, the respondent and the Union entered into a new collective bargaining contract, which is presently in force.[5] This contract contained in addition to all of the provisions of the 1942 contract with variations, several new provisions among which were those dealing with "in-plant feeding," and "dismissal or severance pay."[6] The Union and

[4] According to the stipulation of the parties, the number of employees who elected to participate in the Amended Retirement Plan as of the dates indicated below, and the number of employees in the unit as of such dates, is as follows:

Date	Eligible Employees	Employees who elected to participate	No. of employees in unit
December 31, 1943	659	455	10,669
December 31, 1944	6,114	3,370	10,176
December 31, 1945	6,644	2,961	10,122
September 1, 1946	7,288	3,061	12,019

[5] On February 16, 1946, the wage and termination clauses of the April 30, 1945, contract were amended and supplemented. In all other respects the April 30, 1945, contract remained in effect as written.

[6] The particular section of the contract dealing with dismissal or severance pay is Article XVII, which sets forth that the Union and the respondent accept Section 5, of the Directive Order of the National War Labor Board dated November 25, 1944, in Case No. 111-6230-D (14-1 et al.). Under its terms, the respondent and the Union agree to negotiate with regard to severance pay of employees who were to be displaced as a result of the closing down of plants and facilities which had been built and technologically improved during the war, for the purpose of reducing the overall cost of production. In addition, the article recites that "Among the provisions which should be worked out through collective bargaining are those relating to the eligibility of employees, the amount of severance pay benefits, and circumstances under which the benefits should be paid, the transfer of employees to other suitable employment, the relation to existing pension and retirement plans, etc."

the respondent stipulated that in the negotiations between them leading to the execution of this contract, no mention was made of the age at which the respondent's employees should be retired, of the respondent's Retirement Plan, Amended Retirement Plan, or Pension Trust,[4] of the benefits which should be available to employees on retirement, or any matter pertaining to any retirement or pension plan, or any other matter pertaining to the retirement of the respondent's employees. The parties further stipulated that no request has been made by either the Union or the respondent for collective bargaining pursuant to the final paragraph of Article XVII of the existing contract, referred to hereinabove in footnote 7.

On December 28, 1945, the respondent without first notifying or consulting with the Union, executed and established its Past Service Pension Trust, also referred to herein as the Pension Trust, which provides benefits for service of employees of the respondent and its subsidiaries rendered prior to the date when employees became eligible for benefits under the Retirement Plan and Amended Retirement Plan.[5] According to the respondent, these were employees whose retirement date would occur so soon after they became eligible to participate in the Retirement Plan that it would not afford them the retirement annuity benefits intended. The Pension Trust was established by and under a trust agreement between the respondent and The First National Bank of Chicago as trustee. By its terms, employees are not required to contribute to the Pension Trust. With respect to compulsory retirement, the Pension Trust provides as follows: "Every employee over age sixty-five (65) on December 31, 1945, shall be retired by the Company or Subsidiary as of December 31, 1945. Every other employee shall be retired by the Board of

[4] It should be noted that the Pension Trust, which will be discussed hereinafter, was not established by the respondent until December 28, 1945.

[5] The number of employees in the unit who were covered under the provisions of the Pension Trust as of December 28, 1945, was 4,550. During the period between December 28, 1945, and September 1, 1946, an average of approximately 4,195 employees in the unit were within the coverage of the Pension Trust. The number of employees in the unit on December 28, 1945, was approximately 10,120, and the average number of employees in the unit during the period between December 28, 1945, and September 1, 1946, was 10,169.

Directors of the Company or Subsidiary on the January 1st nearest his sixty-fifth (65) birthday. The Company or Subsidiary, however, may for exceptional reasons from year to year request any retired employee to continue in employment beyond his retirement date. Notwithstanding the fact that an employee may continue in employment beyond such date, he shall be considered to be retired for the purposes of this Pension Trust on such date."

Between December 28, 1945, and February 22, 1946, the respondent announced to approximately 256 employees in the unit its intention to retire the said employees as of March 31, 1946, because they had reached age 65. The parties stipulated that during the period August 26, 1941, and April 1, 1946, the respondent by reason of the war emergency did not require or compel the retirement for age of any employee in the unit.[10]

On February 22, 1946 the Union filed a grievance with the respondent in which the Union protested the respondent's contemplated action of retiring its employees because they had reached age 65, and in which the Union stated that the automatic retirement of employees who reached age 65 would constitute a breach of the existing contract between the respondent and the Union.

At a meeting on March 5, 1946, the respondent notified the Union that it would not negotiate or deal with the Union concerning this grievance on the ground that the Union did not have the right to question the respondent's policies with respect to the retirement of its employees.

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[10] Successive resolutions of the respondent's Board of Directors dated January 26, 1944, October 25, 1944, and January 25, 1945, referred to the continuing emergency and provided that employees whose names were certified by the respondent's president would be continued in active service for such period as he might determine, provided that such service should terminate on or before December 31, 1945. A further resolution of October 31, 1945, referred to the fact that though hostilities had ceased, an emergency still existed and in some cases peculiar circumstances made immediate retirement inadvisable from the standpoint of the respondent's operations. The president was authorized to defer the retirement of any employees in his descretion, with the proviso that in no event should such retirement be deferred beyond June 30, 1946. By April 1, 1946, all employees of the respondent and its subsidiaries who had reached the established retirement age of 65 had been retired.

Harry Powell, vice president of the Union and grievance committeeman, testified that after the refusal of the respondent to discuss the question of the retirement of 65-year-old employees, the meeting was adjourned and the Union's executive board met with Joseph Germano, district director of the United Steelworkers of America, as to the possible courses of action that the Union could take in this situation. Germano advised that the Union could strike or file an unfair labor practice charge with the Board. The executive board then recommended to the membership of the Union at a regular meeting, that they be empowered to take strike action in the event the respondent proceeded with its plan to compulsorily retire employees age 65 or over, which recommendation was accepted by the membership. Thereafter, the executive committee decided against strike action.

At a meeting between the respondent and the Union, held on March 25, 1946, the respondent reiterated its previous position regarding this grievance, and concluded the meeting with the statement that it would not discuss these matters further with the Union on the ground that, since certain legal issues were involved concerning an employer's obligations under the Act to bargain collectively on the subject of retirement of employees, the matters would have to be presented to the Board.

On April 1, 1946, and on various dates up to September 12, 1946, the respondent without first consulting with the Union, retired 224 named employees in the unit, because they had reached age 65, and accorded the said employees the right to obtain such benefits as retired employees as they would be entitled to under the Amended Retirement Plan and or the Pension Trust.

CONCLUSIONS

The issue presented in this case, reduced to its essentials, is whether or not the requests of a duly designated bargaining representative, to discuss with an employer the projected retirement of a group of employees age 65 and over, under the terms of the employer's Pension Plan, comes within the recognized scope of collective bargaining, so that the refusal on

the part of an employer to negotiate with respect to the terms of its Pension Plan would constitute a violation within the meaning of Section 8 (5) of the Act. Inasmuch as the respondent contends that no matters relating to its Pension Plan come within the scope of collective bargaining, it is not sufficient to determine here whether the Union has the right to negotiate with respect to a single phase of the entire Pension Plan, but it becomes necessary in fact to determine whether pension plans in themselves fall within the scope of collective bargaining.

A review of the decisions of the Board and the courts indicates that no definitive exposition by competent authorities has ever laid down general principles which would facilitate the classification of matters sought to be negotiated and help to determine by rule of thumb whether certain demands of labor organizations do or do not fall within the proper scope of collective bargaining. Where this issue has arisen heretofore, it apparently has been treated on a case to case basis, so that over the years during which the Act has been administered, the subjects which more commonly are matters of concern between employers and their employees, have been held to fall within or without the scope of collective bargaining. A painstaking examination of the authorities fails to disclose any consideration of the issue here involved."

It is conceivable that the demands of employees may sometimes fall completely dehors the limits of employee interest. The Act, does not seek to encroach on those prerogatives of

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" The undersigned makes note however, that the War Labor Board considered cases involving retirement funds and issued directive orders thereon. In *American Locomotive Co.*, Case No. 111-12105-D, 2nd Regional Board, the majority opinion states:

"It is too well settled to admit of debate that a provision for employee retirement benefits constitutes a term and condition of employment, and, therefore, a valid subject of collective bargaining . . . It is apparent to us that the innovation, modification, or elimination of so important a condition of employment as a pension plan is properly a subject of collective bargaining. The absence of such provision in a trade union agreement does not preclude collective bargaining on the subject any more than the inclusion of such provisions in the agreement bars collective bargaining for its modification or elimination."

See also War Labor Board cases; *Pacific Telephone and Telegraph Company*, 111-12972-D; *Western Union Telegraph Company*, Case No. 388.

the employer which gives him a free hand to prosecute his business as he sees fit. Demands, therefore, which seek to restrict the employer in this right would clearly not be such as can reasonably fall within the scope of collective bargaining. Our system of free enterprise must necessarily protect the employer in enjoying what is commonly termed his "management prerogatives." True it is, that over the years during which the Act has been in existence, matters which formerly had been urged as purely "management prerogatives" were, by judicial and quasi-judicial opinion, held to be matters which employees had the right, in the interest of industrial stability, to seek to attain by peaceable negotiation. But there are undoubtedly broad areas of management interests which have been so readily accepted by labor as not to fall within the scope of their interests to negotiate, that few of these have had occasion to come within the purview of governmental agencies or the courts for determination.

It is well known however, that over the years of negotiations between unions and employers, the accepted subject matter of collective bargaining has expanded, so that presently various subjects which were formerly deemed to be reserved as "management prerogatives" are bargained about. Trade unions now commonly bargain about group insurance, hospitalization, and medical care.[11] The collective agreements entered into in the coal mining industry have included such matters as the condition of company houses rented by employees, the right of the union to participate in the choice of a surgeon for a company financed hospital, and measures to improve conditions affecting health, safety and welfare. In fact, in coal mining, the unions participate in the control of "all aspects of the productive process which affect the miner's opportunity to earn a living."[12]

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[11] Lieberman, *The Collective Labor Agreement* (1939) 111-112, 131-133; Seidman, *The Needle Trades* (1942) 251, 269-270; U. S. Bureau of Labor Statistics, Bull. No. 686 (Union Agreement Provisions, 1942) 194-201; Bull. No. 393 (Trade Agreements, 1923 and 1924) 116; Bull. No. 448 (Trade Agreements, 1926) 181, 193; Bull. No. 468 (Trade Agreements, 1927) 193.

[12] Suffern, *The Coal Miner's Struggle for Industrial Status* (1926) 359, 376.

In the ladies' garment industry agreements with the union "specify the conditions under which an employer may reorganize his business, or enter into another partnership, or send materials to other firms for fabrication, or introduce a work-week as opposed to a piece-work basis of wage payments." [14]

In the current contract between the respondent and the Union herein, in addition to the regular features of wages, hours, and conditions of employment, provision is made for "In-Plant Feeding," with the Union having the right to advise and consult with the respondent concerning the provisions and maintenance of such service.

Indeed, in the men's and boys' clothing industry, the union and the employer's association recently announced [15] the completion of negotiations for an industry wide old-age pension plan for workers who have reached the age of 70 and have seen twenty years of service in the industry. The pension plan supplements a comprehensive system of life, health, accident, hospitalization, and maternity insurance already set up in the industry through collective bargaining, to all of which the entire contribution is made by the employers.

Does then the demand of the Union in the instant case to discuss the respondent's Pension Plan, come within the collective bargaining area, or is the Pension Plan within the field reserved strictly to management's sole consideration?

Considerable research on the economic character of pensions and the reasons for their existence has been conducted. J. H. Woodward expressed the employer's objectives and the considerations the employer expects and does receive by the establishment of a pension system as follows: [16]

> The employer, however, necessarily looks upon a pension scheme as a business proposition. It is not his affair to correct the defects of human nature or remedy social shortcomings except insofar as his efforts are warranted

[14] Pierson, *Collective Bargaining Systems* (1942) 32; Carsel, *A Short History of the Chicago Ladies Garment Workers Union* (1940) 226-228; U. S. Bureau of Labor Statistics, Bull. No. 686 (Union Agreement Provisions, 1942) 214-216.

[15] See New York Times, December 2, 1946.

[16] From an address on the subject of industrial pensions before the Casualty Actuarial Society in November, 1919.

by an increased efficiency in his staff. For him the retirement system accomplishes the following:

(a) It eliminates the cost of continuing on the pay-roll employees who are no longer active and who are therefore receiving, in the absence of any systematic plan, what in effect constitutes disguised pensions.

(b) It enables the employer to get rid of inefficient employees whom he might otherwise hesitate to discharge.

(c) It decreases his rate of labor turn-over.

(d) It serves to attract to his employ thrifty and far-sighted men and to repell the more improvident who wish to be able to consume this entire income as it is earned.

(e) It lessens unrest.

(f) It makes certain, if soundly-constructed, that the cost of superannuation is assessed against the product at the time when it is incurred."

The Research Institute of America states that "the pension plan is particularly adapted toward promoting labor stability; that is, reducing labor turnover. The reason is twofold: first, it provides a measure of security for the worker in his old age and thus reduces the internal pressure within the worker himself; second, since maximum benefits under the plan do not accrue to the employee until he reaches retirement age, there is a strong financial interest which deters the worker from switching jobs." [2]

Thus it appears that pension plans are purely economic in nature, and all authorities agree that industrial pensions have their origin in certain definite problems faced by management, and constitute a means for meeting such problems. M. W. Latimer states the point as follows:

". . . As the pension movement has spread, and as experience with the operation of the plans has become broader, the relief aspects have tended to decline in importance though perhaps never to disappear entirely, and economic motives have come more to the fore. Corporations at times have found it difficult, without some sys-

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[1] See also Luther Conant, Jr., "*A Critical Analysis of Industrial Pension Systems*" (1922).

[2] Labor Coordinator, Vol. 3, *Pension Plans and Profit Sharing*, Research Institute of America, p. 78,008.

tematic methods of providing a continuing income, to eliminate promptly from their payrolls employees whose pay exceeds the value of their services." [19]

While industrial pension plans may vary as to their different features, such as contribution by both employee and employer, sole contribution by the employer,[20] optional retirement benefits, and termination of service by death, nevertheless practically all pension plans, and particularly the respondent's Pension Plan, contain the basic elements of compulsory retirement, and retirement income. It is elementary that the lay-off of employees goes to the heart of the employer-employee relationship. It can hardly be debated that when an employee is compulsorily retired, he has for all purposes lost his job. Can a distinction be drawn between the loss of a worker's employment as a result of compulsory retirement and the termination of his employment because of other economic compulsion? Has not the retired employee lost his job just as effectively as has an employee who is discharged for cause or not for cause? Without question the conditions upon which a worker's employment may be terminated is a subject matter in which he has a vital interest and is a bargainable issue.[21] It appears clear to the undersigned that the establishment of a working condition which limits the productive life of the employee, as in the instant case, his compulsory retirement at age 65, is a condition of employment, subject to collective bargaining, and the undersigned so finds.

The respondent contends that no industrial retirement annuity program can be effective and attain the purposes for which it is established unless a uniform fixed retirement age is included as a part of it and unless employees are in fact

[19] M. W. Latimer, *Industrial Pension Systems in the United States and Canada* (1932) p. 18.

[20] The respondent's Pension Plan was of the contributory and non-contributory types.

[21] Cf. *Matter of Timken Roller Bearing Co.*, 70 N.L.R.B. No. 39, where the Board held that the system of sub-contracting work may vitally affect employees by progressively undermining their tenure of employment and the refusal to negotiate with respect to this subject, claimed by the company to be a "management prerogative," was a violation of Section 8 (5) of the Act.

retired from the service at such age. Accepting this principle, it nevertheless does not relieve the respondent of the requirement to bargain with respect thereto, since as has been found above, the establishment of a compulsory retirement age is a condition of employment. This is particularly so, since as the respondent sets forth in its belief, quoting from Latimer,[25]

> "*There is no fixed year of life in which men may be said to be unfit for work, even in a very definite occupation. This depends in part on the nature of their employment and in part on the special characteristics of the individual as related to general health and strength.* Despite wide variations among individuals, however, it is possible to set an age above which few persons are able to perform a given kind of labor. Moreover, occurrences affecting the ability of any individual, which taken alone seems entirely fortuitous, assume a distinct pattern when considered in the mass and arranged in logical classification. While the incapacity of an individual may be accidental, the grouping and analysis of a body of such phenomena indicate that approximately a given number of persons will be disabled every year and that the total of these disabilities classified by age, sex, race, occupation, place of residence and so on does not vary widely from year to year." (Italics supplied.)

Should then the employees not be heard through their duly chosen bargaining representatives, in an effort to make a determination jointly with the respondent on the issue regarding the age at which their jobs should be terminated? It should be borne in mind that the respondent is not compelled to reach an agreement with the Union on this issue. The requirement is that the respondent consult with the Union and explore in good faith the possibility of reaching an agreement so that, in conformity with the purposes of the Act, the matter may be moved, so far as is possible as a cause of industrial strike.[26]

Retirement income, the other basic component of a pension plan, has been characterized variously by students of pension

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[25] See footnote 19, *supra*.

[26] As heretofore found, after the respondent refused to discuss the issue of the impending retirement of employees age 65 at a regular grievance meeting, the Union was authorized to strike but did not do so.

systems as rewards, bonuses, gratuities, deferred wages, etc. It is the contention of the respondent that pensions are not wages, deferred or otherwise, for the following reasons: (1) that since employee's wages are not decreased because his employer provides pensions, therefore pension payments cannot be considered deferred wages; and (2) a pension is neither a gift nor a wage, but rather a payment justified in part by the value to the employer of continuity of service of his employees, whereby an employer can make savings which are used to provide pensions. Counsel for the Board, on the other hand, urges that pensions are a form of wages and thus a direct subject for collective bargaining.

There is apparently no disagreement of the parties with the doctrine that a pension is a form of compensation paid to an employee in recognition of his service over a considerable number of years. The financial provision for such retirement payments is either contributed in whole or in part, by the employer during each year of service of the employee, and has been looked upon as a proper charge against production."

Thus, counsel for the respondent in his brief, quoting from a report on "Pensions" issued by the Department of Manufacture of the United States Chamber of Commerce states: "It is felt by many employers that the faithful service of an employee over a long period of years merits some tangible recognition. Long and faithful service in itself is thus considered to be of sufficient value to a company to warrant a reward by making financial provisions for the employee who has been worn out in its service."

In a simiar vein, counsel for the Board in an economic study introduced in evidence recited the following:

> The only really satisfactory way of providing pensions for employees is to set aside sums for the purpose whilst the men concerned are still on the active list. *After all, the pensions are earned during the working years of life, and not after retirement, and it is only reasonable to provide for the liability at the time it is incurred;*

[a] See *Why Pensions Pay*, Social Engineering Institute, Inc., Bulletin No. 1, 1927; See also A. D. Cloud, *Pensions in Modern Industry*, pp. 444,445.

not to do so can only mean that the profits shown as earned by the business are over-stated at the expense of the future. *Pension's should, therefore, be regarded as being in the nature of additional remuneration which is to be set aside to accumulate for the benefit of the staff until certain defined contingencies arise.*" (Italics supplied.)

The Encyclopaedia of the Social Sciences,[8] also cited by counsel for the Board in his economic study contains the following:

> This doctrine considers a pension as compensation paid to the employee for the gradual destruction of his wage earning capacity in the course of his work. Retirement being a proper charge against the employee's entire period of active service, the employer should make contributions toward the employee's eventual retirement during each year of service of the employee, in a manner similar to that in which he annually sets aside a reserve against depreciation and obsolescence of his plant and machinery. *Pensions, according to this doctrine, are an absolutely indispensable complement of wages.* (Italics supplied.)

In the opinion of the undersigned, when a worker enters the employ of a company that has an established pension plan, he considers the plan as an integral part of his program of employment[9] and that his total compensation consists of two parts: wages while rendering services, and retirement payments after he has ceased active employment.[10] Although there are differences in terminology, in essence retirement payments are the result of earnings during one's active employment which accrue upon reaching a fixed retirement age, in which the employee has a strong financial interest during his working years. As such, the undersigned finds that re-

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[8] H. H. Howards and R. Murrell, *Staff Pension Schemes*, London (1927), pp. 2.

[8] Volume 12, p. 67.

[9] See *Wilson* v. *Rudolph Wurlitzer Co.*, 48 Ohio App. 459, 194 N.E. 441, 443 (1934).

[10] Williston on Contracts, Revised Edition 1028 (Vol. 4, 2868-2869) states: "A promise to pay a 'retirement pension' is properly regarded as a promise for additional compensation."

tirement payments by whatever term they are described," are within the area of wages and properly are a subject for collective bargaining.

The respondent also urges that a plan for the retirement of its employees is one which as a matter of law resolves itself as a "management prerogative" and one in which its employees can have no legitimate interest. In support of this contention it points out that the language of Section 8 (5) and 9 (a) of the Act is taken from the similar language of Section 2 (First) of the Railway Labor Act of 1926;[*] since at the time of the passage of the Railway Labor Act on May 20, 1926, at least 68 of the major Class I Railroads in the United States had pension plans in effect, which were established and maintained in existence, and administered unilaterally by the employer railroads without discussion or negotiation concerning them with any labor organization, and no labor organization either before or subsequent to the passage of the Railway Labor Act requested collective bargaining negotiations with any of the railroads concerning any of such plans; that on the date of the passage of the Railway Labor Act, 40 of the 47 railroads (including the Pullman Company) which had formal pension plans in effect on that date had established a compulsory retirement age for their employees and retired such employees upon their reaching such compulsory retirement age, and that no labor organization engaged in collective bargaining, or sought to bargain collectively concerning the establishment of a compulsory retirement age or the compulsory retirement of employees pursuant thereto, at or prior to or subsequent to the said date; that, therefore, the requirement of Section 2 of the Railway Labor Act, as to making and maintaining "agreements concerning rates of pay, rules, and working conditions," was not considered by Congress, by the railroads, or by the unions involved as embracing the making of agreements concerning pension

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[*] It is worthy of note that U. S. Bureau of Internal Revenue, *Regulations III (Current), Sec. 29.22 (a)-2*, provide that retirement payments are income to the recipients and are classified as compensation for personal services and taxable as such.

[*] 44 Stat. 577.

plans or the establishment of a compulsory retirement age or the retirement of employees on reaching that age. Even assuming *arguendo*, the validity of the respondent's contention as above set forth, the undersigned cannot conceive that thereby Congress intended to eliminate negotiations between employers and unions with respect to pension plans from the field of collective bargaining forever. Collective bargaining is not something which is static, but on the contrary is dynamic. As pointed out heretofore, the accepted subject matter of collective bargaining has expanded over the years of negotiations between employers and unions. The fact is as the Supreme Court pointed out in *Order of Railroad Telegraphers* v. *Railway Express Agency*:[21]

> *Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.* From the first the position of labor with reference to the wage structure of an industry has been much like that of the carrier's about rate structures. It has insisted that exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining *has been generally conceded to include the right of the representative of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions.* (Italics supplied.)

It is accordingly clear, from these and other authorities, that the argument here advanced by the respondent is without merit and the undersigned so finds.[22]

The respondent further contends that the requirement of collective bargaining which calls for a contract for a fixed term, normally of one year, is inconsistent with, and precludes, collective bargaining concerning pension programs

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[21] 321 U.S. 342.

[22] For a fuller discussion of the obligation imposed upon employers to bargain collectively, and the scope of collective bargaining as interpreted by the Supreme Court and the Circuit Courts of Appeals, see *Weyand, Majority Rule in Collective Bargaining*, 45 Columbia Law Review, 556.

which are established as long range projects; and since the respondent has contracts with 23 different collective bargaining agencies, to require it to renegotiate the provisions of its Pension Plan each year would destroy any possibility of consistency, permanence and uniformity, would inevitably result in discriminations among employees in different bargaining units of the respondent and its subsidiaries, and render it as a practical matter a question of very grave doubt whether any pension program could be maintained at all under such circumstances of conflict and uncertainty. The mere fact that the respondent anticipates difficulty about future bargaining in this area because of the multiplicity of the collective bargaining agencies and the various bargaining units they represent, does not render the respondent immune from its obligation, particularly since as found above pension plans are properly within the scope of collective bargaining. It is not beyond the realm of possibility, that all of the collective bargaining agencies with whom the respondent has contracts would be willing to meet at a general meeting to discuss jointly the provisions of its Pension Plan with the respondent, since all of the workers represented by collective bargaining agents are similarly affected by its terms and provisions. Furthermore, as heretofore noted, nothing in the Act compels the respondent to reach an agreement with any of the collective bargaining agents on this issue. The requirement is that the respondent discuss the issue and explore in good faith the possibility of reaching an agreement. The undersigned finds this contention without merit.

The respondent's contention that Article XI the "management clause" of its existing contract with the Union has the effect of vesting exclusively in it the right to establish a fixed retirement age, and to retire employees pursuant thereto, is without merit. In the *Timkin Roller Bearing Co.*, case,[*] the Board had under consideration a "management clause" practically identical with the clause in the instant case, and the contention that such a clause relieved the Company of the necessity for bargaining with Union as to such matters which may

[*] 70 N.L.R.B. No. 39.

come under a broad interpretation of this clause. The Board held as follows:

> Without discussing whether or not more specific language in the contract would have given the respondent the right to refuse to bargain as to such matters as are found to be violations of Section 8 (5) herein. . . . the "management clause" as presently written cannot in any event properly be construed to cover the situation here for the reason that it is not specific but is, on the contrary, vague and uncertain. To construe the phrases "management of the works" and "direction of the working forces" as a grant of power to the respondent unilaterally to change the working conditions or hours of employment, would make a nullity of Section 8 (5) of the Act. It cannot be supposed that the Union relinquished its right, granted by the Act, to bargain for the employees *at any time* by such language as this.

Counsel for the Board raised the contention during oral argument that the failure of the respondent to negotiate the Union's claim that the existing contract between the respondent and the Union was breached because of the automatic retirement of employees who reached age 65, was in and of itself a violation of Section 8 (5) of the Act. Without determining whether or not the contract was breached, it nevertheless was incumbent upon the respondent to listen to the Union's contention with an open mind and to discuss it with a view to arriving at an amicable understanding if there was a basis therefor.

The Board has frequently held [*]

> that the execution of a collective contract does not end the process of collective bargaining, and that the interpretation and administration of a contract already made and the settlement of disputes arising under any such contract are properly regarded as within the sphere of collective bargaining.

That collective bargaining does not end with the signing

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[*] *Matter of Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, at p. 706. See also, *Matter of Rapid Roller Co.*, 33 N.L.R.B. 557; *Matter of Carroll's Transfer Company*, 56 N.L.R.B. 935; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 24; *Matter of The Alexander Milburn Co.*, 62 N.L.R.B. 482; *Matter of Timken Roller Bearing Company*, 70 N.L.R.B. No. 39.

of a contract has been held by the Supreme Court in the *Sands* case,[*] where the Court said:

> The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employees to bargain collectively with their employers to the end that employment contracts binding on both parties should be made. But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employee's representatives respecting proposed changes of an existing contract and also to discuss with them its interpretation, if there is any doubt as to its meaning.

In the Newark Morning Ledger case,[**] the Circuit Court of Appeals for the Third Circuit said:

> . . . it may at any time become desirable or indeed necessary to bargain collectively for the modification of an existing collective agreement which has proved in practice to be in some respects unfair or unworkable or for the adjustment of complaints or alleged violations of such an agreement. Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. It is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result.

The authority of the Union to represent the employees stems from the fact of its majority status, and is statutory rather than contractual in character. The choice of a bargaining agent by a majority of the employer's employees does not in and of itself require that the employer make any change in wages, or other conditions of employment. However, after the advent of a collective bargaining representative, unilateral action by the employer taken without consultation with the bargaining agent, on any matter relating to wages or conditions of employment, as in the instant case, the execution and

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[*] *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332.

[**] *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262 (C.C.A. 3); cert. denied 314 U.S. 692.

establishment of the Past Service Pension Trust and the retirement of employees who had reached age 65, becomes proscribed. The collective bargaining process following certification of the bargaining representatives, is analagous to the governmental process. In *Steele* v. *Louisville & Nashville R. R. Co.*,[7] the Court held, with respect to the Railway Labor Act:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body to create and restrict the rights of those whom it represents. . .

Instead of performing only the limited function of fixing the rules governing employment as the respondent views it, collective bargaining has come to mean a system whereby employees participate through democratically chosen representatives in the control of their conditions of employment, not merely in making the rules but in their interpretation and execution. The substitution of this process for direct negotiations between employer and individual employees establishes in the plant a form of industrial democracy, paralleling and implementing the political democracy which the employee enjoys outside the plant. That the establishment of working conditions in industry is, after the advent of the collective bargaining representatives, essentially a governmental process was noted by the Court in *National Labor Relations Board* v. *Highland Park Mfg. Co.*,[8] where it was held:

> The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee

[7] 323 U.S. 192.
[8] 110 F. 2d 632 (C.C.A. 4).

is to be conducted. Wages may be fixed by such agreements and specific matters may be provided for; but the thing of importance is that the agreement sets up a modus vivendi, under which employer and employee are to carry on. It may be drawn so as to be binding only so long as both parties continue to give their assent to it; but the mere fact that it provides a framework within which the process of collective bargaining may be carried on is of incalculable value in removing the causes of industrial strife. If reason and not force is to have sway in industrial relationships, such agreements should be welcomed by capital as well as by labor. They not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer.

The undersigned finds that the respondent, by unilaterally executing and establishing its Past Service Pension Trust without first notifying and consulting with the Union, by refusing to negotiate with the Union on March 5, 1946, and thereafter, concerning a grievance in which the Union protested the contemplated action of the respondent of retiring employees in the unit who had reached age 65, which action the Union stated would constitute a breach of its existing contract; and by retiring employees in the unit who had reached age 65, without first consulting with the Union and by refusing to discuss the matter with the Union, has failed and refused to bargain collectively, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce

The undersigned finds that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Since it has been found that the respondent has engaged

in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the respondent by acting unilaterally with regard to its Pension Plan and without consulting with the Union on this subject, has refused to bargain collectively. It is accordingly necessary, in order to effectuate the policies of the Act, to require the respondent upon request, to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit with respect to its Pension Plan, and to refrain in the future from acting unilaterally in any matter involving its Pension Plan whereby employees in the appropriate unit may be substantially affected without prior consultation with the Union and the undersigned will so recommend.*

Because of the basis of the respondent's refusal to bargain as indicated in the facts found and because of the absence of any evidence that danger of other unfair labor practices is to be anticipated from the respondent's conduct in the past, the undersigned will not recommend that the respondent cease and desist from commission of any other unfair labor practices. Nevertheless, in order to effectuate the policies of the Act, the undersigned will recommend that the respondent cease and desist from the unfair labor practices found, and from in any manner interfering with the efforts of the Union to bargain collectively with it.**

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

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* Counsel for the Board and for the Union during oral argument raised the contention that the Board should, in addition to ordering the respondent to bargain collectively with the Union on all matters pertaining to its Pension Plan, order the respondent to reinstate with back pay all employees who were unilaterally retired, or in the event the Board is unwilling to so order, then to order that any agreement which is reached between the parties after bargaining collectively be made retroactive to the date on which the employees were in fact retired. The undersigned does not believe in view of the limited type of violation of Section 8 (5) herein found, that the aforesaid suggested remedy is its order. It is a matter however, that could be determined in the collective bargaining process.

** See *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426.

Conclusions of Law

1. Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), is a labor organization within the meaning of Section 2 (5) of the Act.

2. All production, maintenance, and transportation workers employed by the respondent at its plant at Indiana Harbor, Indiana, and Chicago Heights, Illinois, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

3. Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) was, on May 23, 1942, and at all times thereafter has been, the exclusive representative of all the employees in such unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), as exclusive bargaining representative of the employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By said acts, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, Inland Steel Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with respect to its Pen-

sion Plan with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) as the exclusive representative of all production, maintenance and transportation workers in the respondent's Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses;

(b) Unilaterally making changes in its Pension Plan which would substantially affect the employees in the aforesaid appropriate unit without prior consultation with Local Unions Nos. 1010 and 64, United Steel Workers of America (CIO);

(c) In any manner interfering with the efforts of Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) to bargain collectively with it:

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with respect to its Pension Plan with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), as the exclusive representative of all the employees in the aforesaid unit;

(b) Consult with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), prior to taking any action substantially affecting any employees in the appropriate unit, in accordance with the terms and provisions of its Pension Plan.

(c) Post at its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached to the Intermediate Report herein marked "Appendix A". Copies of said notice to be furnished by the Regional Director for the Thirteenth Region shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced or covered by any other material;

(d) File with the Regional Director for the Thirteenth Region, on or before ten (10) days from the date of the receipt of this Intermediate Report, a report in writing setting forth in detail the manner and form in which the respondent has complied with the foregoing recommendations.

It is further recommended that unless the respondent notifies said Regional Director in writing within ten (10) days from the receipt of this Intermediate Report that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

Sidney Lindner
Trial Examiner

Dated: January 8, 1947.

"APPENDIX A"

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify all employees that:

WE WILL bargain collectively upon request with Local Unions No. 1010 and 64, UNITED STEELWORKERS OF AMERICA (CIO), as the exclusive representative of all the employees in the bargaining unit described herein with respect to the Retirement and Pension Plans and WE WILL NOT in the future unilaterally make changes in our Retirement and Pension Plan which would substantially affect the employees in the bargaining unit described herein without prior consultation with the above-named Union.

WE WILL NOT in any manner interfere with the efforts of the above-named Union to bargain with us.

The bargaining unit is all production, maintenance, and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

INLAND STEEL COMPANY
(Employer)

Dated ..... By .....
(Representative) *(Title)*

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 13-C-2836

In the Matter of
INLAND STEEL COMPANY
and
LOCAL UNIONS NOS. 1010 and 64, UNITED STEELWORKERS OF AMERICA (CIO)

RETURN BY UNITED STEELWORKERS OF AMERICA TO CONDITIONAL ORDER OF NATIONAL LABOR RELATIONS BOARD

1. Upon the basis of an amended charge filed on August 15, 1946, by United Steelworkers of America on behalf of Local Unions Nos. 1010 and 64 (hereinafter called the Union), the National Labor Relations Board (hereinafter called the Board), issued its Complaint dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act (hereinafter called the Act).

2. On January 8, 1947, Trial Examiner Sidney Lindner issued his Intermediate Report finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action.

3. On August 22, 1947, there became effective certain amendments to the Act.

4. The Act as amended contains certain provisions in Section 9 (f), (g) and (h) thereof. These provisions state:

> "(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such

labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by

paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

5. On April 12, 1948, the Board issued and sent to the parties by mail its Decision and Order in the above case. Said Decision and Order contains the following statement:

"The Union has not complied with the provisions of Section 9 (f), (g), and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein."

6. Section 203.86 of the Board's Rules and Regulations, Series 5, effective August 22, 1947, provides as follows:

> *"Time: additional time after service by mail.*—In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event, the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half-holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

7. The Union has complied with Sections 9 (f) and (g) of the Act as amended within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations. The Union has not complied with the requirements of Section 9 (h) of the Act as amended for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void. Said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution, for the following reasons:

(a) Section 9 (h) of the National Labor Relations Act, as amended, abridges the rights of the Union's officers to freedom of speech, press and assembly in violation of the First Amendment.

(b) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the members of the union to elect officers of their own choosing and interferes with the right of freely elected officers of the Union to function on behalf of the membership by imposing a political test on such officers, thus impairing the right of free assembly in violation of the First Amendment.

(c) Section 9 (h) of the National Labor Relations Act, as

amended, is vague, indefinite and uncertain and prescribes no ascertainable standard of conduct so that any officer of the Union who is required to execute the affidavit under said section is afforded no reasonable means to avoid prosecution under Section 35 A of the Criminal Code.

(d) Section 9(h) of the National Labor Relations Act, as amended, imposes an unreasonable restriction upon the exercise of the rights of free speech and assembly by the officers and members of the Union, in that it compels the loss of valuable property and other rights as a condition to the exercise of the rights of free speech and assembly, in violation of the First Amendment and the due process clause of the Fifth Amendment.

(e) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the officers of the Union to engage in political activity, a right reserved to the people by the Ninth and Tenth Amendments.

(f) Section 9 (h) of the National Labor Relations Act, as amended, applies only to labor organizations and not to employers. This constitutes an arbitrary discrimination against labor organizations, their officers and members, in violation of the Fifth Amendment.

(g) Section 9 (h) of the National Labor Relations Act, as amended, constitutes a bill of attainder in violation of Article I, Section 9 (3) of the Constitution of the United States.

NOW, THEREFORE, by reason of the foregoing the Union has complied with all of the legal conditions prescribed in the Board's Decision and Order of April 12, 1948.

The Union therefore respectfully requests that the Board now make its Decision and Order of April 12, 1948, unconditional in form and effect on the ground that the Union has complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

Respectfully submitted,

ARTHUR J. GOLDBERG,
General Counsel,
United Steelworkers of America and
Local Unions Nos. 1010 and 64.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 13-C-2836

In the Matter of

INLAND STEEL COMPANY

and

LOCAL UNIONS NOS. 1010 and 64, UNITED STEELWORKERS OF AMERICA (CIO)

Service of original and six counterparts of Return of United Steelworkers of America to Conditional Order of National Labor Relations Board is hereby acknowledged, this 14th day of May, 1948.

(s) FRANK M. KLEILER,
Executive Secy., N.L.R.B.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 13-C-2836

In the Matter of
INLAND STEEL COMPANY
and
LOCAL UNIONS NOS. 1010 and 64, UNITED STEELWORKERS OF AMERICA, CIO

ORDER

On April 12, 1948, the National Labor Relations Board issued a Decision and Order in this case, finding that the respondent, Inland Steel Company, had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act. The Board ordered the respondent to cease and desist from said unfair labor practices and to take appropriate affirmative remedial action, but conditioned this Order upon compliance by the Union [1] which had filed the charges, within 30 days from the date of the Order, with the requirements of Section 9 (f) (g) and (h) of the Act as amended.

Thereafter, on May 7, 1948, the Union requested an extension of the conditional portion of the Board's Order, alleging that the question of compliance with the requirements of Section 9 (f) (g) and (h) was to be submitted to the convention of the United Steelworkers of America. The Board has duly considered the matter. It believes that insufficient reason has been shown for granting the requested extension. The request is accordingly denied.

On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board." So far as here material, the Union alleges that it has complied with

[1] Local Unions Nos. 1010 and 64, United Steelworkers of America, affiliated with the Congress of Industrial Organizations. See *Matter of Marshall & Bruce Company*, 75 N.L.R.B. 90.

the requirements of Section 9(f) and (g) of the Act as amended within the time limitation prescribed by the Board's Decision and Order and the Rules and Regulations of the Board, and that it has not complied with the requirements of Section 9(h) of the Act as amended for the sole reason that the provisions of Section 9(h) are illegal, unconstitutional, and void, in that, in specified respects they violate Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution. Asserting that it has thus complied with all the legal conditions prescribed in the Board's Decision and Order of May 12, 1948, the Union requests that the Board now make its said Order unconditional.

Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's Order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended act.[1]

Dated at Washington, D. C., this 17th day of May, 1948.

By order of the Board.

Frank M. Kleiler,
Executive Secretary.

[1] See *Matter of Rite-Form Corset Company, Inc.*, 75 N.L.R.B. 174; *National Maritime Union v. Herzog, et al.*, U. S. District Court for District of Columbia, decided April 13, 1948.

[fol. 388] [Stamp:] Office of the Clerk, Supreme Court, U. S. Nov. 12, 1948

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the seventh day of October, in the Year of our Lord one thousand, nine hundred and forty-seven, and of our Independence the one hundred-seventy-second:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent,

UNITED STEEL WORKERS OF AMERICA, C.I.O., et al., Intervenors-Respondents

No. 9634

UNITED STEEL WORKERS OF AMERICA, C.I.O., et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

On petitions for review of Orders of the National Labor Relations Board.

[fol. 389] And on April 30, 1948, there was filed in case No. 9612 a Petition of Inland Steel Company to Review and Set Aside an Order of the National Labor Relations Board, which said Petition to Review appears on pages 1 to 45 inclusive of the Appendix to Petitioner's Brief in No. 9612 filed on June 26, 1948, and which is certified herewith.

And afterwards, to-wit, on the ninth day of June, 1948, there was filed in case No. 9634 a Petition of United Steel Workers of America, C. I. O., et al. for Review of Orders of the National Labor Relations Board, Motion to Inter-

vene and Consolidate cases, which said petition for review, etc., is in the words and figures following, to-wit:

[fol. 390] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 9634

UNITED STEELWORKERS OF AMERICA, CIO, by its President Philip Murray; Local Unions Nos. 1010 and 64, United Steelworkers of America, CIO, and Members of the United Steelworkers of America, CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petition for Review of Orders of the National Labor Relations Board, Motion to Intervene and to Consolidate Cases

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

United Steelworkers of America, CIO, by its President Philip Murray; Local Unions Nos. 1010 and 64, United Steelworkers of America, CIO and Members of the United Steelworkers of America, CIO, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C.A., secs. 141, et seq. (Sup. July, 1947)) (hereinafter called the Act), believing themselves to be aggrieved by certain final orders of the National Labor Relations Board (hereinafter called the Board), entered on April 12, 1948 and May 17, 1948, respectfully petition this Court to review these orders. The proceeding resulting in said orders is known upon the records of the Board as "In the Matter of Inland Steel Company and Local Union Nos. 1010 and 64, United Steelworkers of America, (CIO), Case No. 13-C-2836."

1. Petitioners are and at all times mentioned herein have been an international labor organization admitting to membership all working men and working women employed in and around iron, steel and aluminum manufacturing, processing and fabricating mills and factories in the United States, Canada and Newfoundland; its president; two local unions affiliated therewith, Local Unions Nos. 1010 and 64,

labor organizations admitting to membership employees in the plants of the Inland Steel Company at Indiana Harbor, [fol. 391] Indiana, and Chicago Heights, Illinois, and the members of said International Union, including the members of Local Unions Nos. 1010 and 64. At all times material herein, the United Steelworkers of America and Local Unions Nos. 1010 and 64 (hereinafter collectively referred to as the Union) have been the representative for the purposes of bargaining collectively with the Inland Steel Company with respect to rates of pay, wages, hours of employment and other conditions of employment, for the employees of the Inland Steel Company in its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.*

2. The respondent Board is a public agency created by the Act, with its principal office in Washington, D. C. The members of said Board were, at the time of the entry of said orders of April 12, 1948 and May 17, 1948, Paul M. Herzog, Chairman, John M. Houston, James J. Reynolds, Jr., Abe Murdock and J. Copeland Gray.

3. Upon the basis of an amended charge filed on August 16, 1946, the Board issued its complaint dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(1) and (5) and Section 2(6) and (7) of the Act, at the Company's plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois.

4. By reason of the matters alleged in paragraphs 1, 2 and 3 hereof, this Court has jurisdiction of this petition, pursuant to Section 10 (f) of the Act (29 U. S. C. A., sec. 160(f)).

5. On January 8, 1947, Trial Examiner Sidney Lindner issued his Intermediate Report finding that the Company had engaged in and was engaging in certain unfair labor

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* Throughout this petition we conform to the practice of the Board in its Decision and Order and refer to the sections of the Act as they were designated prior to the amendment of the Act.

practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively upon request with the Union as the exclusive representative of all the employees in the appropriate bargaining unit and consulting with the Union prior to taking any action substantially affecting any employees in the appropriate unit, in accordance with the terms and provisions of its pension plan.

6. On August 22, 1947, there became effective certain amendments to the Act.

[fol. 392] 7. The amended provisions of the Act include Section 9(f), (g) and (h) thereof (29 U. S. C. A., sec. 159 (f), (g) and (h)). These provisions state:

> "(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—
>
> "(1) the name of such labor organization and the address of its principal place of business;
>
> "(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;
>
> "(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;
>
> "(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secertary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization

unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

[fol. 393] "(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

8. On April 12, 1948, the Board issued and sent to the parties by mail its Decision and Order. Said Decision and Order contained (at p. 14) the following statement:

"The Union has not complied with the provisions of Section 9 (f), (g) and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein."

9. The Order of the Board provides as follows:

"Upon the entire record in the case, and pursuant to Section 10 (c) of the Act, as amended, the National Labor Relations Board hereby orders that the respondent, Inland Steel Company, and its officers, agents, successors and assigns, shall:

"1. Cease and desist from:

(a) Refusing to bargain collectively with Local

Unions Nos. 1010 and 64, United Steelworkers of America (CIO), with respect to its pension and retirement policies if and when said labor organization shall have complied within thirty (30) days from the date of this Order, with Section 9 (f), (g) and (h) of the Act, as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the respondent's Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;

(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above, bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post in conspicuous places throughout its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached hereto marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for thirty (30) consecutive days thereafter and also for an additional thirty (30) consecutive days in the event of compliance [fol. 394] by the Union with the filing requirements of the Act as amended, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the re-

spondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Thirteenth Region in writing, within ten (10) days from the date of this Order, and again within ten (10) days from the future date, if any, on which the respondent is officially notified that the Union has met the condition hereinabove set forth, what steps the respondent has taken to comply herewith."

10. The notice required by the Order to be posted by the Inland Steel Company is as follows:

Notice to All Employees

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees

We will not refuse to bargain collectively with Local Unions Nos. 1010 and 64 of the United Steelworkers of America (CIO), as the exclusive representative of all of the employees in the bargaining unit described herein with respect to our pension and retirement policies, provided said labor organization complies, within thirty (30) days from the date of the aforesaid Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

We will not make any unilateral changes in our pension and retirement policies affecting any employees in the bargaining unit without prior consultation with the Union, provided said labor organization complies within thirty (30) days from the date of the afore-mentioned Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

The bargaining unit is: all production, maintenance and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, time-

keepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

Inland Steel Company (Employer), by ——
——, (Representative) (Title).

Dated —— — ——.

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

11. Said Decision and Order was signed by Board Chairman Herzog, and Board Members Houston, Reynolds and Murdock. It was not signed by Board Member Gray who filed a dissenting opinion.

[fol. 395] 12. Section 203.86 of the Board's Rules and Regulations, Series 5, effective August 22, 1947, provides as follows:

"*Time; additional time after service by mail.*—In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event, the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half-holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

13. On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board", in which the Union recited that it had complied with Section 9 (f) and (g) of the Act, as amended, within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations. The Union further recited in its Return that it had not complied

with the requirements of Section 9 (h) of the Act, as amended, for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void and that said section violated Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States. The Union therefore requested the Board to make its Decision and Order of April 12, 1948, unconditional in form and effect on the ground that the Union had complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

14. On May 17, 1948, the Board issued an Order denying the Union's request for an amendment rendering the Board's Order of April 12, 1948 unconditional.

In so far as here relevant, the Order of May 17, 1948 states:

> "On May 14, 1948, the Union filed with the Board a document entitled 'Return by United Steelworkers of America to Conditional Order of National Labor Relations Board.' So far as here material, the Union alleges that it has complied with the requirements of Section 9 (f) and (g) of the Act as amended within the time limitation prescribed by the Board's Decision and Order and the Rules and Regulations of the Board, and that it has not complied with the requirements of Section 9 (h) of the Act as amended for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional, and void, in that, in specified respects they violate Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution. Asserting that it has thus complied with all the legal conditions prescribed in the Board's Decision and Order of May 12, 1948, the Union requests that the Board now make its said Order unconditional.
>
> [fol 396] "Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's Order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended Act."

15. Petitioners are persons aggrieved by the Board's Orders of April 12, 1948 and May 17, 1948 and present this petition to review said Orders.

Statement of Points

16. That portion of the Board's Order of April 12, 1948 which requires the Union to comply with Section 9 (h) of the Act, as amended, is illegal, unconstitutional, void and of no effect. Said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States for the following reasons:

(a) Section 9 (h) of the National Labor Relations Act, as amended abridges the rights of the Union's officers to freedom of speech, press and assembly in violation of the First Amendment.

(b) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the members of the Union to elect officers of their own choosing and interferes with the right of freely elected officers of the Union to function on behalf of the membership by imposing a political test on such officers, thus impairing the right of free assembly in violation of the First Amendment.

(c) Section 9 (h) of the National Labor Relations Act, as amended, is vague, indefinite and uncertain and prescribes no ascertainable standard of conduct so that any officer of the Union who is required to execute the affidavit under said section is afforded no reasonable means to avoid prosecution under Section 35 A of the Criminal Code.

(d) Section 9 (h) of the National Labor Relations Act, as amended, imposes an unreasonable restriction upon the exercise of the rights of free speech and assembly by the officers and members of the Union, in that it compels the loss of valuable property and other rights as a condition to the exercise of the rights of free speech and assembly, in violation of the First Amendment and the due process clause of the Fifth Amendment.

(e) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the officers of the Union to engage in political activity, right reserved to the people by the Ninth and Tenth Amendments.

[fol. 397] (f) Section 9 (h) of the National Labor Relations Act, as amended, applies only to labor organizations and not to employers. This constitutes an arbitrary discrimination against labor organizations, their officers and members, in violation of the Fifth Amendment.

(g) Section 9 (h) of the National Labor Relations Act, as amended, constitutes a bill of attainder in violation of Article I, Section 9 (3) of the Constitution of the United States.

(h) Section 9 (h) of the National Labor Relations Act, as amended deprives the members of the Union of valuable property rights and of the opportunity to obtain enforcement of said rights in the courts.

17. The Board's Order of May 17, 1948, denying the Union's request for an amendment rendering the Board's Order of April 12, 1948, unconditional is contrary to law and should be set aside on the ground that Section 9 (h) of the Act, as amended, is unconstitutional for the reasons stated in paragraph 16 hereof.

18. Petitioners respectfully assert that they are aggrieved by that portion of the Board's Order of April 12, 1948, requiring them to comply with the requirements of Section 9 (h) of the Act, as amended, and with that portion of the Board's Order of May 17, 1948, denying their request for an amendment of its Order of April 12, 1948 rendering said Order unconditional.

19. On April 30, 1948, there was filed in this Court by the Inland Steel Company, and docketed as Case No. 9612, a petition to review and set aside the Board's Order of April 12, 1948, set forth in full in paragraph 9 hereof requiring the Inland Steel Company to bargain collectively with the Union with respect to its pension and retirement policies. Petitioners herein have a substantial interest in the subject matter of Case No. 9612.

Prayer

Wherefore, petitioners respectfully pray:

1. That said Board be required to certify for filing with this Court a transcript of the entire record in said Case No. 13-C-2836, including the Union's Return to Conditional Order of National Labor Relations Board filed with the

Board on May 14, 1948, and the Board's Order of May 17, 1948.

[fol. 398] 2. That the Board's Order of April 12, 1948, be rendered unconditional on the ground that Section 9 (h) of the National Labor Relations Act, as amended, is illegal, unconstitutional, void and of no effect and that petitioners have such other and further relief as this Court may deem just and proper.

3. That petitioners be permitted to intervene as parties defendants in Case No. 9612 on the ground that they have a substantial interest in the subject matter of the action and that their intervention will not to any extent delay or prejudice the determination of the issues.

4. That this petition be consolidated for all purposes with the petition filed in Case No. 9612 on the ground that both petitions have arisen out of a single Order of the Board.

Respectfully submitted, Philip Murray, President, United Steelworkers of America, CIO; United Steelworkers of America, CIO, and its Members; Local Union No. 1010, USA-CIO; Local Union No. 64, USA-CIO, by Arthur J. Goldberg, Frank Donner, Attorneys for Petitioners.

[fol. 399] And afterwards, to-wit, on the eleventh day of June, 1948, the following proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO 10, ILLINOIS

June 11, 1948

Before Hon. J. Earl Major, Circuit Judge; Hon. Otto Kerner, Circuit Judge; Hon. Sherman Minton, Circuit Judge

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., by Its President Philip Murray, Local Unions Nos. 1010 and 64, United Steelworkers of America, C. I. O., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petitions to Review and Set Aside an Order of the National Labor Relations Board

On petition of counsel for the United Steel Workers of America, C. I. O., by its President Philip Murray, et al., it is ordered that Case No. 9612, entitled Inland Steel Company, Petitioner, vs. National Labor Relations Board, Respondent, and Case No. 9634, United Steel Workers of America, C. I. O., by its President Philip Murray, et al., Petitioners, vs. National Labor Relations Board, Respondent, be, and the same are hereby, consolidated.

On motions of counsel for the Petitioners in Case Nos. 9612 and 9634, it is ordered that these cases be advanced for hearing and that the Petitioners' briefs be filed by June 23, 1948, Respondent's brief be filed by July 12, 1948, reply briefs for Petitioners be filed by July 16, 1948, and that the oral argument be had on July 21, 1948.

[fol. 400] And afterwards, to-wit, on the fourteenth day of June, 1948, there was filed in the office of the Clerk of this Court, the certified transcript of record of proceedings before the National Labor Relations Board, the printed portions of which are contained in the Appendix to Petitioner's Brief in No. 9612, filed on June 26, 1948, the Appendix to Brief for Petitioner's in case No. 9634, filed on June 26, 1948, and the Appendix to Respondent's Brief, filed in cases No. 9612 and 9634 on July 14, 1948.

And afterwards, to-wit, on the twenty-first day of June, 1948, there was filed in the Office of the Clerk of this Court, the Answer of the National Labor Relations Board to the Petitions for Review filed in cases No. 9612 and 9634, which said answer to petitions for review appears on pages 46 to 55 inclusive of the Appendix to Petitioner's Brief in No. 9612 filed on June 26, 1948.

[fol. 401] And afterwards, to-wit, on the twenty-third day of June, 1948, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., by Its President Philip Murray, Local Unions Nos. 1010 and 64, United Steel Workers of America, C. I. O., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petitions to Review and Set Aside an Order of the National Labor Relations Board

Before Major, C. J.; Kerner, C. J.

On motion of counsel for the United Steel Workers of America, C. I. O., by its President Philip Murray, Local Unions Nos. 1010 and 64, United Steel Workers of America, C. I. O., and Members of the United Steel Workers of

America, C. I. O., it is ordered by the Court that leave be, and the same is hereby, granted to the said Union to intervene in Case No. 9612.

[fol. 402] And afterwards, to-wit, on the twenty-sixth day of June 1948, there was filed in the office of the Clerk of this Court an Appendix to Petitioner's Brief in No. 9612, which said Appendix is certified as a part of this transcript under a separate certificate.

And on the same day, to-wit, on the twenty-sixth day of June, 1948, there was filed in the office of the Clerk of this Court an Appendix to Brief for Petitioners in Case No. 9634, which said Appendix is certified as a part of this transcript under a separate certificate.

And afterwards, to-wit, on the fourteenth day of July, 1948, there was filed in the office of the Clerk of this Court an Appendix to Respondent's Brief in Cases No. 9612 and 9634, which Appendix is certified as a part of this transcript under a separate certificate.

[fol. 403] And afterward, to-wit, on the twenty-first day of July, 1948, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petition for Review of An Order of the National Labor Relations Board

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Ernest S. Ballard, counsel for the Petitioner, and by Mr. Marcel Mallet-Prevost, counsel for the Respondent, and the Court takes this matter under advisement.

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No. 9634

UNITED STEEL WORKERS OF AMERICA, C.I.O., by Its President, Philip Murray, Local Unions Nos. 1010 and 64, United Steel Workers of America, C.I.O., and Members of the United Steel Workers of America, C.I.O., Petitioners

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petition for Review of An Order of the National Labor Relations Board

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Arthur J. Goldberg and Mr. Frank Donner, counsel for the Petitioners, and by Mr. Mozart G. Ratner, counsel for the Respondent, and the Court takes this matter under advisement.

[fol. 404] And afterwards, to-wit, on the twenty-second day of July, 1948, there was filed in the office of the Clerk of this Court the Answer of the National Labor Relations Board to Petitioner's Motion in Case No. 9612 to strike certain matter from the Appendix to the Board's Brief, which Answer is in the words and figures following, to-wit:

[fol. 405] [Stamp:] U. S. C. C. A.-7. Filed Jul. 22, 1948. Kenneth J. Carrick, Clerk

Major, C. J. Kerner, C. J. Minton, C. J.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 9612

INLAND STEEL COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, CIO, et al., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition to Review and Set Aside An Order of the National Labor Relations Board

Answer to Petitioner's Motion (In No. 9612) To Strike Certain Matter from the Appendix to the Board's Brief

Comes now the National Labor Relations Board, respondent herein, and by its Chief Enforcement Attorney, opposes the motion of petitioner in No. 9612 to strike from the appendix to the Board's brief certain portions of Board Exhibit 3 printed therein. In support of its opposition to said motion the Board respectfully shows as follows:

The entire text of Board Exhibit 3, as printed in the appendix to the Board's brief is part of the official transcript of record filed with the Court in this proceeding. It

was received in evidence by the trial examiner, with the express understanding, as petitioner states in its motion (p. 2), that "the exhibit is offered solely as evidence of [fol. 406] the extracts from publications and documents quoted therein" and that the "various statements and arguments there . . . Shall be considered as part of the arguments of Board's counsel in connection with the issue involved in this case" (Co. App. 207-208).

The entire text of Board Exhibit 3, being part of the record herein, we submit that the Board could properly include it in the appendix to the Board's brief, and that petitioner's motion should be denied.

Respectfully submitted, Owsley Vose, Chief Enforcement Attorney.

Dated: July 19, 1948.

[fol. 407] And afterward, to-wit, on the twenty-third day of September, 1948, the following further proceedings were had and entered of record, to-wit:

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1947, APRIL SESSION, 1948

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petitions to Review and Set Aside an Order of the National Labor Relations Board

September 23, 1948

Before Major, Kerner, and Minton, Circuit Judges

MAJOR, Circuit Judge:

These cases are here upon petition (in No. 9612) of Inland Steel Company (hereinafter called the Company), to review

leges, had a right to attach as a condition to their enjoyment the requirement contained in Sec. 9 (h). The Board in its brief states and restates that the purpose of Congress was to eliminate from the bargaining process Communist-dominated Unions. Its position is stated thus:

> "We turn then to the precise questions which may here properly be presented, whether denial of the benefits of the Act to labor organizations whose officers are Communists or members of Communist dominated organizations, or who believe in, or support organizations which advocate violent overthrow of the government, is reasonably related to the objectives which Congress legitimately sought to promote by enactment of the statute, and whether the methods utilized to promote these objectives are appropriate means for their effectuation."

Referring to the opinion in the *Herzog* case, the Board states:

> "The Court concluded that the consequences upon self-organizational activity of wilful non-compliance by a union with conditions which Congress was entitled to impose could not be attributed to Congress or to the Board, but solely to the union itself, and that denial [fol. 424] of the benefits of the Act to labor organizations which refused to comply could therefore not be said to deprive those labor organizations of their constitutional right to freedom of association."

Thus, the fallacious premise is laid for the Board's argument that Congress, having endowed labor organizations with certain benefits, was justified in imposing a condition that such benefits should not be enjoyed by Communist-dominated organizations. A hypothetical situation is created which bears no resemblance either to the requirements of the section or to the benefits bestowed by the Act. Sec. 9 (h) imposes no obligation upon a Union, Communist-dominated or otherwise; in fact, a Union is without power to comply with the condition which Congress has imposed. This is in marked contrast with Sec. 9 (f), and (g), which require the Unions to file certain factual reports as a prerequisite to their right to act as a bargaining agent. The instant section is directed at the individual officers of this

and set aside an order issued by the National Labor Relations Board on April 12, 1948, against the Company, pur-[fol. 408] suant to Sec. 10(c) of the National Labor Relations Act,[1] following the usual proceedings under Sec. 10 of the Act, and upon petition (in No. 9634) of the United Steel Workers of America, C. I. O. (hereinafter called the Union), to review and set aside a condition attached to the Board's order.

In the beginning, it seems appropriate to set forth that portion of the Board's order which gives rise to the questions here in controversy. The order requires the Company to

> "Cease and desist from:
>
> "(a) Refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), with respect to its pension and retirement policies if and when said labor organization shall have complied within thirty (30) days from the date of this Order, with Section 9(f), (g), and (h) of the Act, as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the [petitioner's] Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;
>
> "(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above."

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[1] The National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. Secs. 151, et seq.) (hereinafter referred to as the Act) was amended by the Labor Management Relations Act, 1947, effective August 22, 1947 (61 Stat. 136, 29 U. S. C. A. Supp. July, 1947, Secs. 141, et seq.) (hereinafter referred to as the amended Act). The unfair labor practices found by the Board herein occurred, in part, prior to the effective date of the amendment and, in part, thereafter.

far flung labor organization, each of whom has been empowered to stymie the entire bargaining process and thus deprive the Union of its right to act as bargaining agent. And a single official can do this very thing by refusing to make the affidavit for any reason or no reason. He may refuse solely because of an arbitrary or capricious attitude, because the terms of the statute are so vague as to make it uncertain whether the affidavit can be truthfully made, or because he belongs to the proscribed class. Thus, the section gathers within its devastating reach a Union all of whose officials save one are willing and able to make the affidavit.

The impact which this section has upon employees represented by the Union is even more pronounced. As illustrative, the Union in the instant situation has been duly selected by some 12,000 employees of an appropriate bargaining unit as their agent. The Board minimizes, in fact almost ignores, their predicament. Their interest is disposed of on the erroneous theory that their rights stem from Congress, and what Congress has given it can take away.

It is well to keep in mind, however, what the Board appears to overlook, that is, that employees have certain constitutional rights irrespective of any benefit bestowed by the Wagner Act or its successor. It has been held that the right "to organize for the purpose of securing redress of [fol. 425] grievances and to permit agreement with the employers relating to rates of pay and conditions of work" is a constitutional right, and that the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other material protection is fundamental. Further, that employees have as clear a right to organize and select their representatives for a lawful purpose as an employer has to organize its business and select its own officers and agents. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 33. And it has been held that the right of workmen or of Unions "to assemble and discuss their own affairs is as fully protected by the Constitution as the right of business men, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others." *Thomas* v. *Collins*, 323 U. S. 516, 539. And as employees have a constitutional right to organize, to select a bargaining agent of their own choosing and, if members of a Union, to elect the

The Company, in case No. 9612, attacks that portion of the order which requires it to bargain with respect to its retirement and pension policies. The Union has been permitted to intervene and joins the Board in the defense of this part of the order. The Union, in case No. 9634, at-
[fol. 409] tacks the condition attached to the order, which requires as a prerequisite to its enforcement that the Union comply with Sec. 9(h) of the Act. Obviously, if the Company's position is sustained, the Union's petition need not be considered. On the other hand, if the Company's contention is denied, we will be confronted with the question raised by the Union.

We shall, therefore, first consider the question presented on the Company's petition for review. In doing so, we do not overlook the Board's contention that we are without authority to consider such question on the ground that the Company is not aggrieved until there has been compliance by the Union with the condition attached to the order. We think this contention is without merit and need not be discussed.

There is no question as to jurisdiction and no dispute of any consequence as to the facts in either case. The Company's refusal to bargain concerning a retirement and pension plan is based solely on its contention that it is not required to do so under the terms of the Act. The Union has refused to comply with the condition attached to the order insofar as Sec. 9 (h) is concerned, on the ground that the paragraph is unconstitutional. Thus, a question of law is presented in each case.

The collective bargaining requirement in the original Act was embraced mainly in Secs. 8(5) and 9(a)[2]. No question is raised as to any change in the status of the parties because of the amended Act. It seems, therefore, that the original Act is of importance only as an aid in construing the amended Act wherein Congress employed the identical language, so far as pertinent to the instant question, which it had originally used.

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[2] These sections were reenacted in Secs. 8(a)(5) and 9(a) of the amended Act, without material change so far as the present issue is concerned. The Board found that retirement and pension matters were subjects of compulsory collective bargaining under the Act and that they remained so under the amended Act.

officials of such Union, so I would think that the bargaining agent when so selected had a right of equal standing to represent for all legitimate purposes those by whom it had been selected. The employees in the instant situation have availed themselves of constitutional rights in selecting the Union as their bargaining agent and in the election of its officials.

At this point it is pertinent to observe that the Wagner Act was enacted primarily for the benefit of employees and not for Unions. The latter derive their authority from the employees when selected as their bargaining agent, rather than from the law. The very heart of the Act is contained in Sec. 7, which provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing * * *." This was not a Congress-created right but the recognition of a constitutional right, which Congress provided the means to protect. This is clearly shown by the declared policy of the Act that commerce be aided "by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[fol. 426] In my view, the condition attached to the Board's order in the instant case is a direct and serious impairment upon these constitutional rights of both the employees and the Union. The rights of the former to organize, select a bargaining agent of their own choosing and elect officers of the Union have been reduced to a state of meaningless gesture. *See Texas and N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 570, and *Labor Board v. Jones & Laughlin, supra*, page 34.

In order to comply with the condition of the Board's order, they must select a bargaining agent, not of their own choosing but one which conforms to the pattern which Congress has prescribed. The fundamental right to elect officers of their Union, untrammeled and unfettered, has been made subservient to the congressional edict as to the character of officials which will be tolerated. Not only does the section represent an intrusion by Congress in the internal affairs of a Union and its members, but it is legislative

The Company relates in lengthy detail the complicated nature of its retirement and pension plan, for the purpose, as we understand, of showing that it is impossible, or at any rate highly impractical, for it to bargain relative thereto with the multiplicity of bargaining units which the Board has established in its plant. It states in its brief:

> [fol. 410] "Retirement and pension plans such as the petitioner's cannot be dealt with through the processes of compulsory collective bargaining required by the National Labor Relations Act, which entail bargaining within units of the character established by Section 9(a) and (b) of that Act."

The Company concedes that "Congress could have established a requirement of compulsory collective bargaining upon any subject which a representative of the employees chose to present for that purpose," and we understand from some parts of its argument that it tacitly concedes that some retirement and pension plans may be within the scope of the bargaining requirement. However, we find in the Company's reply brief, in response to the Board's argument, what appears to be the inconsistent statement that "Congress intended to exclude from the compulsory bargaining requirement of the Act all industrial retirement and pension plans. The law is a law for all and it is the same law." We agree, of course, with the last sentence of this quotation. We also are of the view that the bargaining requirements of the Act include all retirement and pension plans or none. Otherwise, as the Board points out, "some employers would have to bargain about pensions and some would not, depending entirely upon the unit structure in the plant and the nature of the pension plan the employer has established or desires to establish." Such a holding as to the Act's requirements would supply the incentive for an employer to devise a plan or system which would be sufficiently comprehensive and difficult to remove it from the ambit of the statute, and success of such an effort would depend upon the ingenuity of the formulator of the plan. We are satisfied no such construction of the Act can reasonably be made.

It is, therefore, our view that the Company's retirement and pension plan, complicated as it is asserted to be,

must be treated and considered the same as any other such plan. It follows that the issue for decision is, as the Board asserts, whether pension and retirement plans are part of the subject matter of compulsory collective bargaining within the meaning of the Act. The contention which we have just discussed has been treated first, and perhaps somewhat out of order, so as to obviate the necessity for a lengthy and detailed statement of the Company's plan.

Briefly, the plan as originally initiated on January 1, [fol. 411] 1936, provided for the establishment of a contributory plan for the payment of retirement annuities pursuant to a contract between the Company and the Equitable Life Assurance Society. Only employees with earnings of $250.00 or more per month were eligible to participate. Effective December 31, 1943, the plan was extended to cover all employees regardless of the amount of their earnings, provided they had attained the age of 30 and had five years of service. The plan from the beginning was optional with the employees, who could drop out at any time, with rights upon retirement fixed as of that date. On December 28, 1945, the Company entered into an agreement with the First National Bank of Chicago, wherein the Company established a pension trust, the purpose of which was to augment the Company's pension program by making annuities available to employees whose period of service had occurred largely during years prior to the time when participation in the retirement plan was available to them. These were employees whose retirement date would occur so soon after the establishment of the plan that it would not afford them adequate retirement annuity benefits. The employees eligible to participate in the pension trust were not required to contribute thereto, but such fund was created by the Company's contributions.

An integral and it is asserted an essential part of the plan from the beginning was that employees be compulsorily retired at the age of 65. (There are some exceptions to this requirement which are not material here.)

The Company's plan had been in effect for five and one-half years when, because of the increased demands for production and with a shortage of manpower occasioned by the war, it was compelled to suspend the retirement of its employees as provided by its established program. In consequence there were no retirements for age at either

of the plants involved in the instant proceeding from August 26, 1941 to April 1, 1946. This temporary suspension of the compulsory retirement rule was abrogated, and it was determined by the Company that no retirements should be deferred beyond June 30, 1946. By April 1, 1946, all of the Company's employees, some 224 in number, who had reached the age of 65, had been retired. Thereupon, the Union filed with the Company a grievance protesting its action in the automatic retirement of employees at the age of 65. The Company refused to discuss this grievance [fol. 412] with the Union, taking the position that it was not required under the Act to do so or to bargain concerning its retirement and pension plan, and particularly concerning the compulsory retirement feature thereof. Whereupon, the instant proceeding was instituted before the Board, with the result already noted.

This brings us to the particular language in controversy. Sec. 8(5) of the Act requires an employer "to bargain collectively with the representative of his employees, subject to the provisions of Sec. 9(a)," and the latter section provides that the duly selected representative of the employees in an appropriate unit shall be their exclusive representative "for the purpose of collective bargaining *in respect to rates of pay, wages, hours of employment, or other conditions of employment* • • •." (Italics supplied.) The instant controversy has to do with the construction to be given or the meaning to be attached to the italicized words; in fact, the controversy is narrowed to the meaning to be attached to the term "wages" or "other conditions of employment."

The Board found and concluded that the benefits accruing to an employee by reason of a retirement or pension plan are encompassed in both categories. As to the former, it stated in its decision:

> "With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term 'wages' as used in Section 9(a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. • • • Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure,

and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected."

The Board also found and concluded that in any event a retirement and pension plan is included in "conditions of employment" and is a matter for collective bargaining. After a careful study of the well written briefs with which we have been favored, we find ourselves in agreement with the Board's conclusion. In fact, we are convinced that the language employed by Congress, considered in connection with the purpose of the Act, so clearly includes a retirement [fol. 413] and pension plan as to leave little, if any, room for construction. While, as the Company has demonstrated, a reasonable argument can be made that the benefits flowing from such a plan are not "wages," we think the better and more logical argument is on the other side, and certainly there is, in our opinion, no sound basis for an argument that such a plan is not clearly included in the phrase, "other conditions of employment." The language employed, when viewed in connection with the stated purpose of the Act, leads irresistibly to such a conclusion. And we find nothing in the numerous authorities called to our attention or in the legislative history so strongly relied upon which demonstrates a contrary intent and purpose on the part of Congress.

The opening sentence in the Company's argument is as follows: "Sections 8(5) and 9(a) of the Act do not refer to industrial retirement and pension plans, such as that of the petitioner, *in haec verba*." Of course not, and this is equally true as to the myriad matters arising from the employer-employee relationship which are recognized as included in the bargaining requirements of the Act but which are not specifically referred to. Illustrative are the numerous matters concerning which the Company and the Union have bargained and agreed, as embodied in their contract of April 30, 1945. A few of such matters are: a provision agreeing to bargain concerning nondiscriminatory discharges; a provision concerning seniority rights, with its far reaching effect upon promotions and demotions; a provision for the benefit of employees inducted into the military service; a provision determining vacation periods with pay; a provision concerning the safety and health of

of the Board, and they must do this even though it be contrary to their belief, conscience and better judgment. Experience, ability, honesty and integrity of candidates for official positions in the Union must be cast aside.

For similar reasons, the section also affects, and I think seriously impairs, the fundamental rights of Union officials. The affidavit prescribed is directed at the belief entertained by the affiant in contrast to conduct, behavior or action. Assuming *arguendo*, however, that it has no effect upon the constitutional right of an officer who refuses to make it, what about the effect upon those who comply? The right of the officers of a union to manage and control its affairs is a basic right and I would suppose to be exercised in accordance with the principle of majority rule. The section, however, limits the rights of the officers of a Union by making them dependent upon the affirmative action of each officer. The officers who make the affidavit, even though in the majority, are no better off than if they had refused. More than that, the affidavit, particularly in view of its vague and uncertain terms, is calculated to create in the mind of the maker a continuous apprehension lest the affiant make some expression, perform some act, have some association [fol. 428] or indulge in conduct which might later be used as evidence to show that the affidavit was false. As was said in the dissenting opinion in *Minersville School District* v. *Gobitis*, 310 U. S. 586, 606:

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."

In my view, Congress has attempted to do indirectly what it could not do directly under the Constitution. "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect." *Oyama* v. *California*, 332 U. S. 633, 636.

Many cases are cited and relied upon in support of the

employees, including clinic facilities; a provision for in-plant feeding, and a provision binding the Company and the Union to bargain, in conformity with a Directive Order of the National War Labor Board concerning dismissal or severance pay for employees displaced as the result of the closing of plants or the reduction in the working force following the termination of the war. None of these matters and many others which could be mentioned are referred to in the Act "*in haec verba*," yet we think they are recognized generally, and they have been specifically recognized by the Company the instant case as proper matters for bargaining and, as a result, have been included in a contract [fol. 414] with the Union. Some of the benefits thus conferred could properly be designated as "wages," and they are all "conditions of employment." We think no common sense view would permit a distinction to be made as to the benefits inuring to the employees by reason of a retirement and pension plan.

The Company in its brief states the reasons for the establishment of a uniform fixed compulsory retirement age for all of its employees in connection with its retirement annuity program, among which are (1) "The fixed retirement age gives the employee advance notice as to the length of his possible service with the Company and enables him to plan accordingly," (2) "The fixed retirement age prevents grievances that otherwise would multiply as the question of each employee's employability arose," (3) "A fixed retirement age gives an incentive to younger men," and (4) "It is unfair and destructive of employee morale to discriminate between types of jobs or types of employees in retiring such employees from service." These reasons thus stated for a compulsory retirement age demonstrate, so we think, contrary to the Company's contention, that the plan is included in "conditions of employment."

The Supreme Court, in *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 360, held that collective bargaining extends to matters involving discharge actions and, as already noted, the Company in its contract with the Union has so recognized. We are unable to differentiate between the conceded right of a Union to bargain concerning a discharge, and particularly a nondiscriminatory discharge, of an employee and its right to bargain concerning the age at which he is compelled to retire. In either case, the employee loses his job at the command of the employer; in either case,

argument that Congress was reasonably justified in attaching the condition contained in Par. (h) as a prerequisite to the right of employees to compulsory bargaining. Without attempting to mention all of such cases, a few may be noted as typical. *Turner* v. *Williams*, 194 U. S. 279; *Hawker* v. *New York*, 170 U. S. 189; *Hamilton* v. *Board of Regents*, 293 U. S. 245, *United Public Workers* v. *Mitchell*, 330 U. S. 75. The strongest of these cases, in my judgment, is the *Mitchell* case. There, the question involved was the constitutionality of the Hatch Act, which forbade government employees to engage in political activity, admittedly a right protected by the First Amendment. There, the favor bestowed by Congress was governmental employment, and an employee had the choice between accepting the favor and foregoing his right to engage in political activity, or in declining the governmental favor and exercising such right. This is quite a contrast to the instant situation where the grant is bestowed upon the employees with the power lodged in a third person to prevent them from obtaining the benefit.

Turner v. *Williams*, *supra*, is of no benefit to the Board's position. There, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant. As later pointed out in *Bridges* v. *Wixon*, 326 U. S. 135, 161, "Since an alien obviously [fol. 429] brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit." In other words, an alien, at least in the first instance, is not entitled to the benefits of the Bill of Rights. In the *Hawker* case, *supra*, it was held that a State could constitutionally prevent persons who had previously been convicted of a felony from practicing medicine. The decision goes no further than holding that the State under its police power had the authority to fix the standards to be met by one who sought the privilege of administering to the health and well being of its citizens. In *Hamilton* v. *Board of Regents*, it was held that the State might properly bar from its colleges persons who refused to attend classes in military training. Again, the condition attached to the privilege could be met at the discretion of the person who sought to become the recipient of the State's favor.

A more relevant pronouncement is that contained in *Frost Trucking Co.* v. *R. R. Commission*, 271 U. S. 583. There,

the effect upon the "conditions" of the person's employment is that the employment is terminated, and we think, in either case, the affected employee is entitled under the Act to bargain collectively through his duly selected representatives concerning such termination. In one instance, the cessation of employment comes perhaps suddenly and without advance notice or warning, while in the other, his employment ceases as a result of a plan announced in advance by the Company. And it must be remembered that the retirement age in the instant situation is determined by the Company and forced upon the employees without consultation and without any voice as to whether the retirement age [fol. 415] is to be 65 or some other age. The Company's position that the age of retirement is not a matter for bargaining leads to the incongruous result that a proper bargaining matter is presented if an employee is suddenly discharged on the day before he reaches the age of 65, but that the next day, when he is subject to compulsory retirement, his Union is without right to bargain concerning such retirement.

The Company, however, attempts to escape the force of this reasoning by arguing that the retirement provision affects tenure of employment as distinguished from a condition of employment. The argument, as we understand, rests on the premise that the Act makes a distinction between "tenure of employment" and "conditions of employment," and attention is called to the use of those terms in Secs. 8(3) and 2(9) of the Act. Having thus asserted this distinction, the argument proceeds that tenure of employment is not embraced within the term "conditions of employment." Assuming that the Act recognizes such distinction for some purposes, it does not follow that such a distinction may properly be made for the purpose of collective bargaining, as defined in Sec. 9(a). "Tenure" as presently used undoubtedly means duration or length of employment. The tenure of employment is terminated just as effectively by a discharge for cause as by a dismissal occasioned by a retirement provision. And in both instances alike, the time of the termination of such tenure is determined by the Company. As already shown, a termination by discharge is concededly a matter for collective bargaining. To say that termination by retirement is not amenable to the same process could not, in our judgment, be supported by logic,

reason or common sense. In our view, the contention is without merit.

The Company also concedes that seniority is a proper matter for collective bargaining and, as already noted, has so recognized by its contract with the Union. It states in its brief that seniority is "the very heart of conditions of employment." Among the purposes which seniority serves is the protection of employees against arbitrary management conduct in connection with hire, promotion, demotion, transfer and discharge, and the creation of job security for older workers. A unilateral retirement and pension plan has as its main objective not job security for older workers but their retirement at an age predetermined by the Company, and we think the latter is as much included in "conditions of employment" as the former. What would be [fol. 416] the purpose of protecting senior employees against lay-off when an employer could arbitrarily and unilaterally place the compulsory retirement age at any level which might suit its purpose? If the Company may fix an age at 65, there is nothing to prevent it from deciding that 50 or 45 is the age at which employees are no longer employable, and in this manner wholly frustrate the seniority protections for which the Union has bargained. Again we note that discharges and seniority rights, like a retirement and pension plan, are not specifically mentioned in the bargaining requirements of the Act.

The Company in its brief as to seniority rights states that it "affects the employee's status every day." In contrast, the plain implication to be drawn from its argument is that an employee is a stranger to a retirement and pension plan during all the days of his employment and that it affects him in no manner until he arrives at the retirement age. We think such reasoning is without logic. Suppose that a person seeking employment was offered a job by each of two companies equal in all respects except that one had a retirement and pension plan and that the other did not. We think it reasonable to assume an acceptance of the job with the company which had such plan. Of course, that might be described merely as the inducement which caused the job to be accepted, but on acceptance it would become, so we think, one of the "conditions of employment." Every day that such an employee worked his financial status would be enhanced to the extent that his pension benefits increased, and his labor would be performed under a pledge from the

company that certain specified monetary benefits would be his upon reaching the designated age. It surely cannot be seriously disputed but that such a pledge on the part of the company forms a part of the consideration for work performed, and we see no reason why an employee entitled to the benefit of the plan could not upon the refusal of the company to pay, sue and recover such benefits. In this view, the pension thus promised would appear to be as much a part of his "wages" as the money paid him at the time of the rendition of his services. But again we say that in any event such a plan is one of the "conditions of employment."

The Company makes the far fetched argument that the contributions made to a pension plan "differ in no respect [fol. 417] from a voluntary payment that might be made to each employee on his marriage, or on the birth of a child, or on attaining the age of 50, or on enlisting in the armed forces in time of war or on participating as a member of a successful company baseball team," but we think there is a vast difference which arises from the fact that such hypothetical payments are not made as the result of a promise contained in a plan or program. They represent nothing more than a gift. Assume, however, that such supposed payments were made to employees as a result of a company obligation contained in a plan or program. Such an obligation would represent a part of the consideration for services performed, and payments made in the discharge of such obligation would, in our view, be "wages" or included in "conditions of employment."

The Board cites a number of authorities wherein the term "wages" in other fields of law has been broadly construed in support of its conclusion in the instant case that the term includes retirement and pension benefits for the purpose of collective bargaining. While we do not attach too much importance to the broad interpretation given the term in unrelated fields, we think they do show that a broad interpretation here is not unreasonable. For instance, the Board has been sustained in a number of cases where it has treated for the purpose of remedying the effects of discriminatory discharges, in violation of Sec. 8 (3) of the Act, pension and other "beneficial insurance rights of employees as part of the employees' real wages and, in accordance with its authority under Sec. 10 (c), to order reinstatement of

particular person or group because of the personal belief of their associates. As was said in *Schneiderman v. United States*, 320 U. S. 118, 136:

> "• • • under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

That the section is void because of its vague and uncertain language appears plain. This is so both as to the persons within its scope and the subject matter of the required affidavit. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta v. New Jersey*, 306 U. S. 451, or in regard to the applicable tests to ascertain guilt." *Winters v. New York*, 333 U. S. 507, 515.

The section applies to "each officer of such labor organization and the officers of any national or international labor organization." Such officers are neither enumerated nor defined, either in the section in controversy or otherwise in the Act. While the record does not purport to disclose a list of such officers, it does show that the agreement between the Union and the company was signed by six officials of the national organization, including Philip J. Murray, as president, and by nine officers of the local Union. From the agreement it is discernible that there are twenty members of the grievance committee with authority to negotiate on the part of the Union, twenty assistant [fol. 432] members of the grievance committee, and a safety committee of equal number authorized to represent the Union in its dealings with the company concerning safety matters. I assume that there are hundreds of officers between the bottom and the top of this vast labor organization. The importance of the word "officer" is evident, particularly in view of the fact that "each officer" is given the power by refusal to make the affidavit to paralyze a Union and its members.

That those who come within the scope of the word "officer" have been left in a state of uncertainty and doubt is well illustrated by an opinion of the Labor Board. In

employees with * * * back pay," and has required the employer to restore such benefits to employees discriminated against. See *Butler Bros., et al.* v. *N. L. R. B.*, 134 F. 2d 981, 985, *General Motors Corp.* v. *N. L. R. B.*, 150 F. 2d 201, and *N. L. R. B.* v. *Stackpole Carbon Co.*, 128 F. 2d 188. In the latter case, the court stated (page 191) that the Board's conclusion "seems to us to be in line with the purposes of the Act for the insurance rights in substance were part of the employee's wages."

In the Social Security Act (49 Stat. 642, Sec. 907, 42 U. S. C. A. Sec. 1107), the same Congress which enacted the National Labor Relations Act defined taxable "wages" as embracing "all remuneration * * * for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other [fol. 418] than cash * * *." This definition has been construed, as the Supreme Court noted, in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 365 (note 17), as including "vacation allowances," "sick pay," and "dismissal pay."

In the field of taxation, pension and retirement allowances have been deemed to be income of the recipients within the Internal Revenue Act definition of wages as "compensation for personal services." (26 U. S. C. A. Int. Rev. Code Sec. 22 (a)). Thus, in *Hooker* v. *Hoey*, 27 F. Supp. 489, 490, affirmed 107 F. 2d 1016, the court said: "It cannot be doubted that pensions or retiring allowances paid because of past services are one form of compensation for personal service and constitute taxable income * * *."

The Company in its effort to obtain a construction of Sec. 9 (a) favorable to its contention devotes much of its brief to the legislative history of the Act which it is claimed demonstrates that Congress did not intend to subject retirement and pension plans to the bargaining process. In view of what we have said, this argument may be disposed of without extended discussion. It is sufficient to note that we have studied this legislative history and, while there are some portions of it which appear to support the Company's position, yet taken as a whole it is not convincing. It would, in our judgment, require a far stronger showing of congressional intent than exists here before we would be justified in placing a construction upon the provision in question which would do violence to the plain words of the statutory

The Matter of *Northern Virginia Broadcasters, Inc., etc.* and *Local Union No.* 1215, *of the National Brotherhood of Electrical Workers*, page 11, volume 75, Decisions and Orders of the N. L. R. B. In that case, the Regional Director, following instructions of the General Counsel of the Labor Board, dismissed the proceeding for failure of compliance with Sec. 9 (h) by the American Federation of Labor, with which the local Union was affiliated. The Board held that compliance by officials of the national organization was not required, on the ground that such a construction would make the section unworkable. There was a concurring and a dissenting opinion. The point is that the Board itself had great difficulty in deciding who were included in the term "officer," and the decision when made was by a divided Board. This emphasizes the difficult problem presented to officers of a Union in attempting to determine whether they are within the scope of persons required to make the affidavit.

The facts required to be stated in the affidavit are of such an uncertain and indefinite nature as to afford little more than a fertile field for speculation and guess. What is meant by a "member of the Communist party or affiliated with such party? How and when does a person become a member of that party, or any other party for that matter? And what does it mean to be "affiliated"? The Supreme Court, in *Bridges* v. *Wixon*, *supra*, devoted several pages to the meaning to be attributed to the word "affiliation," as used in the deportation statute. The court's discussion is convincing that its meaning would be quite beyond the reach of the ordinary citizen. As close as the court came to defining the term was (page 143), "It imports, however, less than membership but more than sympathy." The [fol. 433] court pointed out that cooperation with Communist groups was not sufficient to show affiliation with the party.

What does the word "supports" include? Does a person by voting for the candidates of a party or by attending its meetings and making contributions, or by buying its literature or books, become a supporter thereof? And how can the ordinary person possibly be expected to make an affidavit that he is not a member of any organization that believes in or teaches the overthrow of the United States Government "by any illegal or unconstitutional methods"? These are matters which perplex the Bench and the Bar,

requirement and which would result in an impairment of the purpose of the Act. It may be true, as argued by the Company, that retirement and pension plans were employed only to a limited extent in 1935, when the original Act was passed. Such provisions, however, were being generally used at the time of the passage of the Amended Act in 1947. And we doubt the validity of the argument that the language of the latter Act cannot be given a broader scope even though Congress used the same phraseology. We do not believe that it was contemplated that the language of Sec. 9 (a) was to remain static. Congress in the original as well as in the amended Act used general language, evidently designed to meet the increasing problems arising from the employer-employee relationship. As was said in *Weems* v. *United States*, 217 U. S. 349, 373:

> [fol. 419] "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."

The Company places great stress upon the bargaining language used in the Railway Labor Act of 1926, on the theory that the instant Act is *in pari materia*. It points out that numerous retirement and pension plans were put into effect by the railroads and that they were never subjected to the process of collective bargaining. This showing is made for the purpose of demonstrating that Congress in the enactment of the legislation now before us did not intend to include such matters. In this connection, we think it is pertinent to note that in the Railway Labor Act the bargaining language was quite different from that of the instant legislation. There, it read, "rates of pay, rules, or working conditions." Here, it reads, "rates of pay, wages, hours of employment, or other conditions of employment." A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. Certainly the term "wages" was intended to include something more than

"rates of pay." Otherwise, its use would have served no purpose. Congress in the instant legislation used the phrase, "other conditions of employment," instead of the phrase, "working conditions," which it had previously used in the Railway Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used. Even though the disputed language of the instant Act was open to construction, we think a comparison of the language of these two Acts is of no benefit to the Company.

The Company places much reliance upon a statement from the opinion in *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332, 339. While the court was not considering a question such as that with which we are now concerned, we think it must be conceded that the language furnishes some support for the Company's position, and if this case stood alone as the sole expression of the Supreme Court relative to the [fol. 420] question before us it would at least cause us to hesitate; however, in a later case, *United States* v. *United Mine Workers of America*, 330 U. S. 258, 286, 287, the court made a statement which indicates a view contrary to the Company's present position. Again, however, the question here presented was not before the court and we do not regard either of these cases as an expression of the view of the Supreme Court upon the instant question. The support which the Company professes to find in the *Case* case is at least offset by the court's statement in the *United Mine Workers* case.

It is our view, therefore, and we so hold that the order of the Board, insofar as it requires the Company to bargain with respect to retirement and pension matters, is valid, and the petition to review, filed by the Company in No. 9612, is denied.

This brings us to the Union's petition for review of the order in No. 9634. Upon issuance of the same, the Union satisfied the condition attached thereto insofar as it pertained to Sec. 9 (f) and (g) of the Act, but failed and refused to comply with Sec. 9 (h).

On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steel Workers of America to Conditional Order of National Labor Relations Board," in which the Union requested the Board to amend its order by making it unconditional. In this document, the Union

alleged "that it had not complied with the requirement of Sec. 9 (h) of the Act, as amended, because the Union believes that Sec. 9 (h) is unconstitutional and void." The Board by its order entered May 17, 1948, denied the request, stating:

> "Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended Act."

Thus, we have presented the important and perplexing problem as to the constitutionality of Sec. 9 (h), the relevant portion of which provides:

> "No investigation shall be made by the Board * * *, no petition * * * shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization * * * unless there is on file with [fol. 421] the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

The Union attacks the constitutionality of Par. 9 (h) on the ground that it is violative of the Constitution in numerous respects. It asserts (1) that the provision invades the political freedom of Philip Murray (petitioner), as well as that of other officials of the Union of which he is the head, and of the members of such Union, in violation of the First, Ninth and Tenth Amendments; (2) that it constitutes a bill of attainder within the meaning of Article I, Sec. 9, Clause 3; (3) that it deprives the Union, its officials

and members of liberty and property without due process of law and arbitrarily discriminates against them in violation of the Fifth Amendment, and (4) that it is unconstitutional because of its vagueness, indefiniteness and uncertainness. The constitutionality of the provision has also been attacked by the National Lawyers Guild in a brief which we have permitted to be filed as *amicus curiae*.

The Board defends the constitutional power of Congress to require as a condition to the compulsory right of a labor organization to bargain collectively that each of its officers make the required affidavit. It is argued (1) that the withholding of such benefits does not impinge on the constitutional right to self-organization; (2) that the condition imposed and the congressional policy which it effectuates does not invade rights of freedom of speech or freedom of the press, or deny freedom of political belief, activity or affiliation; (3) that Congress could reasonably believe that the policies of the Act, and the security interests of the nation, would not be fostered by the extension of the benefits of the Act to labor organizations whose officers are Communists or supporters of organizations dominated by Communists; [fol. 422] (4) that the means adopted by Congress to accomplish such purpose are appropriate; (5) that the language of the provision is sufficiently definite and certain to escape constitutional impairment, and (6) that it does not constitute a bill of attainder.

The constitutionality of Sec. 9 (h) has been sustained in *National Maritime Union* v. *Herzog*, 78 F. Supp. 146, and by the District Court for the Southern District of New York, in *Wholesale and Warehouse Workers' Union, etc.* v. *Doiids*, etc., in a decision rendered June 29, 1948. Each of these cases was decided by a three-Judge statutory court in proceedings wherein it was sought to enjoin the Labor Board from giving effect to the provision in controversy. In the *Herzog* case the court rendered a lengthy opinion in support of its position, which was approved in the *Doiids* case. In each of the cases there was a dissenting opinion in which the dissenting Judge viewed the provision as unconstitutional. In the *Herzog* case the court also sustained the constitutionality of Sec. 9 (f) and (g). On appeal, the Supreme Court in a Per Curiam order entered June 21, 1948, 334 U. S. 854, affirmed the statutory court as to these

two paragraphs but found it unnecessary to consider the validity of Sec. 9 (h).

I find myself in disagreement with my associates. Judge Kerner has written an opinion, concurred in by Judge Minton, upholding the constitutionality of the section. I think to the contrary. Among many Supreme Court cases cited and discussed by the respective parties, there are none which present an analogous situation; in fact, the section is unique in the annals of the entire legislative and judicial field. The cases do teach, however, in unmistakable fashion, especially in recent times, the broad interpretation given the First Amendment and the zealous protection which the Supreme Court has afforded it from impairment or encroachment.

As illustrative, a few cases may be noted. "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." *Thomas* v. *Collins*, 323 U. S. 516, 530. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty [fol. 423] loving society will allow." *Bridges* v. *California*, 314 U. S. 252, 263. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Board of Education* v. *Barnette*, 319 U. S. 624, 642. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U. S. 88, 101.

The Board in substance concedes that the section cannot be justified by what the Supreme Court has characterized the "clear and present danger rule." *Bridges* v. *California*, *supra*, page 263; *Thornhill* v. *Alabama*, *supra*, page 104. Rather, the Board attempts to uphold its validity on the reasoning of the *Herzog* case that Congress, having bestowed upon labor organizations certain benefits and privi-

coercion expressly designed to compel Union members to forego their fundamental rights. "Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." Murphy, J., dissenting in *Jones* v. *City of Opelika*, 316 U. S. 584, 618, subsequently a majority opinion of the court in 319 U. S. 103.

Contrast this philosophy with that which the Board attributes to the Act, as evidenced by the following statement: "The assumption is that if the facts are known through this filing procedure, union members * * * will soon remove Communists from leadership rather than allow themselves to be precluded from enjoying the benefits of the Act. *Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. No. 2."

But it is argued that employees have in their own hands the means of obtaining compliance by the selection of a bargaining representative whose officers are able and willing to make the affidavit. Assuming that employees are always members of a Union which acts as their bargaining-agent, which is not the case, it is a shallow and unrealistic argument. How can employees when they select a Union as their bargaining agent know that each of its officers will be able [fol. 427], and willing to make the affidavit? And how can they compel such officers to do so subsequent to their election? How could the members rid their Union of an officer who refused to make the affidavit, for good reason or no reason? The record before us does not disclose who or how many officers refused to make the affidavit. Assuming, however, that it was Philip Murray, president of a national labor organization of which the instant union is an affiliate, how long, I wonder, would it take the 12,000 employees of the bargaining unit here involved to replace him with an officer who would comply? The Act provides that no election shall be directed in any bargaining unit wherein a valid election has been held within the preceding twelve-month period. Sec. 159 (c) (3). I do not think that the constitutional rights of the employees or the Union can be suspended in mid-air for a time of such dubious and uncertain length.

The upshot of the whole situation is that employees when members of a Union are under a continuing compulsion to elect officers who will meet the congressional prescription in order that their Union may remain in the good graces

the court held that Congress was without constitutional power to do indirectly what it was prohibited from doing directly in a matter wherein it had attached a condition to be performed as a prerequisite to the receipt of a benefit. The court on page 593 stated:

> "May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

The Board reviews at length the congressional history and other data for the purpose of demonstrating that Congress was reasonably justified in attaching the condition as a prerequisite to the enjoyment of the benefits which it had provided. As already pointed out, however, it did not give such beneficiaries the option of compliance or [fol. 430] noncompliance. The result of the congressional inquiry is summarized in the Board's brief as follows:

> "Congress was not unaware that Communist officers of labor organizations sometimes effectively represent the economic interests of members in collective bargaining, and in grievance adjustment, and that to this extent their activities do tend to effectuate the policies of the Act. But Congress believed that whatever public value Communist leadership of labor unions might have in this respect was clearly outweighed by the danger that they might, on other occasions, utilize their power and influence for purposes inimical to the policies of the Act and to national security."

Thus, notwithstanding this congressional recognition that some labor organizations with Communist officials were willing and able to cooperate in effectuating the

policies of the Act, it placed such Unions in the same category with those whose officials were unwilling to do so, and denied to each class alike the benefits and facilities which Congress had provided. By the same token, the rights of loyal and patriotic employees, as well as Union officials, were made to rest upon the affirmative act of "each" officer of the Union. So, if employees of a bargaining unit are willing to submit to the pressure which Par. (h) engenders and are fortunate enough to select a bargaining agent, each of whose officers will make the affidavit, such employees receive the benefits of the Act. Employees, however, who insist on maintaining their fundamental right to select a bargaining agent, or who for any reason have not succeeded in selecting a bargaining agent "each" officer of which is willing to comply, are deprived of the congressional grant. The same comparison may be made between competing Unions. One Union is permitted to represent its employees and the other is not. In my view, a statute which creates such a situation, especially considered in connection with its vague and indefinite requirements, is so arbitrarily discriminatory as to violate the due process clause of the Fifth Amendment. As was said in *Hurtado* v. *California*, 110 U. S. 516, 535:

> "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case . . ."

[fol. 431] See also *Nichols* v. *Coolidge*, 274 U. S. 531, and *United States* v. *Lovett*, 328 U. S. 303.

According to the Board's argument, the congressional target was Communist-dominated Unions. The legislative fire, however, was not directed merely at those whom it intended to disable. The range included a scope of far greater area. It encompassed what it recognized as good Communists as well as the bad. And of more importance it included countless patriotic employees and Union officials who carried no taint of Communism. All alike were made to suffer the same fate and required to answer for the sins of a few, even one. From a practical aspect, it is not unlike throwing a barrel of apples in the river in order to get rid of one that is rotten. From a legal viewpoint, it has the effect of arbtrarily singling out for legislative action a

embodied in §9(h) which the order effectuates, invade the right to freedom of speech and deny freedom of political belief activity. It insists that § 9 (h) "is an attempt to restrict freedom of belief"; that the section is "primarily if not exclusively a restraint upon opinion and belief," and that it "imposes sanctions for the alleged evil of harboring 'dangerous thoughts.'"

In support of its contention the Union cites among others the cases appearing in the margin.[1] A study of these cases discloses that in them the court was concerned with the effect of legislation, or judicial action, which imposed a prior restraint upon speech, press or assembly, or which restricted the occasion for permissible exercise of speech, press or assembly, or which punished the individuals for having published their views.

It is to be borne in mind that the Act was not passed because Congress disapproved of the views and beliefs of Communists, but because Congress recognized that the practices of persons who entertained the views presently to be discussed, might not use the powers and benefits conferred by the Act for the purposes intended by Congress, so, in my view, the question is whether Congress, by providing that the facilities of the Board shall not be available to a labor organization unless each of its officers shall file an affidavit with the Board that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, does not belong to, or support any organization believing in or teaching the overthrow of the [fol. 436] United States Government by force or by any illegal or unconstitutional methods, violated the Constitution.

It is to be remembered that neither belief, nor speech, nor association is the subject matter of the policy of §9(h) and that neither that section nor the Board's order imposes any limitation upon what any labor leader may think

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[1] Stromberg v. California, 283 U. S. 359; DeJonge v. Oregon, 299 U. S. 353; Herndon v. Lowry, 301 U. S. 242; Schneider v. State, 308 U. S. 147; Cantwell v. Connecticut, 310 U. S. 296; Bridges v. California, 314 U. S. 252; West Virginia State Board of Education v. Barnette, 319 U. S. 624; Murdock v. Pennsylvania, 319 U. S. 105; Thomas v. Collins, 323 U. S. 516; and Saia v. New York, 334 U. S. 558.

or say, nor does the order or §9(h) attempt to prohibit or restrain anyone from joining or supporting any organization. Neither the order nor §9(h) denies to Communists the right to speak and to publish freely their views, beliefs and opinions. They may speak as they think. There is no invasion of political rights. Communists are not denied the right to continue to remain members of the Communist Party. The section does not make such affiliation of beliefs punishable either criminally or by the imposition of civil sanctions. In such a situation the cases cited by the Union are inapplicable and hence not controlling here, but as was said in *National Maritime Union* v. *Herzog*, 78 F. Supp. 146, 163, "It is therefore clearly wrong to say that §9(h) impinges on a union officers' freedom of speech."

It is unquestioned that Congress may conclude that the policies of the Act, i.e., stimulation of commerce and the security interests of the nation would be deterred by an extension of the benefits of the Act to labor organizations dominated by officers who are Communists or supporters of organizations dominated by Communists, and that it may take steps to effectuate its conclusions. In fact the "congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' • • •. That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'" *National Labor Regulations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36. Nevertheless, the Union contends that §9(h) contravenes the guarantees of the Ninth and Tenth Amendments. It insists that the instant case involves more than a regulatory measure, and it argues that if the statute is viewed as one "restricting expression of advocacy," it fails to meet the clear and present danger test.

[fol. 437] While it is true that "a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the reg-

and the diversity of opinion among Judges as to what is illegal and unconstitutional often marks the boundary line between majority and dissenting opinions.

See the recent case of *United States* v. *Congress of Industrial Organization*, 335 U. S. 106, and particularly the concurring opinion by four members of the court, which held unconstitutional Sec. 313 of the Federal Corrupt Practices Act of 1925, as amended by Sec. 304 of the instant Act, because of the vagueness and uncertainty of the phrase, "a contribution or expenditure in connection with any election * * *." The discussion is quite relevant to the instant situation. On page 153 it is stated:

> "Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage. In this respect the amendment's policy adds its own force to that of due process in the definition of crime to forbid such consequences. * * * Only a master, if any, could walk the perilous wire strung by the section's criterion."

The Board makes no serious argument but that the section is vague and uncertain as charged. It attempts to excuse its infirmities by contending (1) that its vagueness is cured by Sec. 35-A of the Criminal Code, and (2) that the rule against vagueness and uncertainty is not applicable because the statute is not compulsory. No authorities are [fol. 434] cited which sustain either proposition.

The substance of the argument in favor of the first proposition is that an officer of a Union need not be too much concerned about the truthfulness of the affidavit which he makes because he can only be convicted under Sec. 35-A of the Criminal Code for "knowingly and wilfully" making a false affidavit. In the Board's own words, "Clearly, no affiant could successfully be prosecuted under this section for filing a false affidavit under Sec. 9 (h) unless it could be proved that he knowingly lied in making

the averments contained in his affidavit." This statement, so I think, could be made concerning every prosecution for perjury. The Board makes the further puerile suggestion that an affiant need not be afraid of a groundless prosecution because "our law provides adequate modes of redress to victims of malicious prosecution."

To me, this argument is shocking and should be repudiated in no uncertain terms. Bluntly stated, it means that an officer of the Union who makes the affidavit need not be concerned with the sanctity of his oath because of the unlikelihood of conviction in case of a prosecution for perjury. He need not be afraid because the only danger which he assumes is the hazard of a prosecution which when unsuccessful leaves him as the possessor of a damage suit against his accuser in an action for malicious prosecution. This argument is a persuasive indication that the section should be invalidated because of its vagueness and uncertainty.

Neither do I think there is any merit in the suggestion that the authorities as to vagueness and uncertainty are inapplicable because the making of the affidavit is voluntary. In reality, the making of the affidavit is indispensable if the Union is to survive and the rights of its members protected. It is made at the invitation of Congress, and I can discern no reason why the rule as to uncertainty and vagueness should not be applied. The reason for the rule, as the authorities show, is that persons of ordinary intelligence may not be required to guess or speculate at the meaning of a statute, and every reason of which I can think which entitles the maker of a compulsory affidavit to such information exists in the instant situation. The need for this information is emphasized from the fact that the section serves notice that one who makes a false affidavit is subject to prosecution for perjury.

[fol. 435] I would hold Sec. 9(h) unconstitutional and direct the elimination of the condition which the Board has attached to its order.

Judge Kerner. I concur in Judge Major's opinion that the Board properly determined that pension and retirement plans constitute part of the subject matter of compulsory collective bargaining under the Act, but I am not persuaded that §9(h) of the Act is invalid.

The Union's principal contention is that the condition imposed by the Board's order and the Congressional policy

ulated activities," cannot be supported under the Constitution, *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552, 556, yet Congress has the power to withhold benefits which it confers for the accomplishment of legitimate purposes within its constitutional powers from those who, it has cause to believe, may utilize those benefits for directly opposite purposes. For example, in *Turner* v. *Williams*, 194 U. S. 279, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant, and in *United Public Workers* v. *Mitchell*, 330 U. S. 75, it was held that in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity. And in *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 143, it was held that Congress in the exercise of its powers to "fix the terms upon which its money allotments to states shall be disbursed," could constitutionally deny allotments to states which refuse to remove from their payrolls employees who engage in political activity. See also *In re Summers*, 325 U. S. 561; *Hamilton* v. *Board of Regents*, 293 U. S. 245; *Hawker* v. *New York*, 170 U. S. 189; *Clarke* v. *Deckebach*, 274 U. S. 392; and *Kotch* v. *Board of River Port Pilot Commissioners, supra*. And where factors relevant to the attainment of legitimate legislative policies are shown, their use as a basis for distinction is not to be condemned. *Hirabayashi* v. *United States*, 320 U. S. 81, 101. That being so, I think it well to inquire whether there are factors reasonably related to the attainment of the objectives which Congress sought to promote.

Unquestionably, the Labor Management Relations Act, 1947, 61 Stat. 136, was designed to lessen industrial disputes. This purpose is clearly shown in the declaration of policy, §1(b) of the Act, and in the amendment to the findings and policies contained in § 1 of the National Labor Relations Act.

Prior to the passage of the National Labor Relations Act, employers were free to discharge employees for joining labor organizations, and to refuse to bargain collectively with labor organizations which represented their employees. And it is clear that when Congress enacted that [fol. 438] Act it sought to minimize strikes in industries af-

fecting commerce by promoting the process of collective bargaining as a practice conducive to friendly adjustments of disputes over wages, hours and working conditions between employers and employees. In doing this, Congress imposed new obligations upon employers and provided administrative machinery for the enforcement of those obligations, but it did not impose those duties because it was under a constitutional obligation to employees or labor organizations to do so. On the contrary, the statute was enacted solely because Congress deemed the imposition of those duties desirable as a means of protecting the public interest in the free flow of commerce, but the benefits of the Act could not be extended to shield concerted activities which Congress had not intended to protect, *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, and any benefit which employees or labor organizations derived from the enforcement of these public rights was entirely incidental to the public purposes which enforcement was designed to achieve. True, under the Act, the Board acts in a public capacity, but not for the adjudication of private rights; rather it exists to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining. The entire scheme of the statute emphasizes this point, and the Supreme Court has so held, *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177; and *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 319 U. S. 9.

Before the enactment of §9(h), hearings were conducted by Congressional committees which showed that Communists did not view labor unions primarily as instrumentalities for the attainment of legitimate economic aims; that certain practices of some labor organizations whose officers were members of or supporters of the Communist Party tended to foment industrial unrest and strife; and that these practices were inimical to the purposes for which the protection of the Act had been granted. From the evidence thus produced and considered Congress believed that Communists and their supporters and persons who advocate the violent overthrow of the Government, when they attain positions of power and leadership in a labor

[fol. 439] organization might not practice collective bargaining as a method of friendly adjustment of employer-employee disputes, but instead might use their position as a vehicle for promoting dissension and strife between employers and employees, and that Communists and their supporters and persons who advocate violent overthrow of the Government, if in control of labor organizations, might provoke strikes disruptive of commerce, not for the purpose of improving the economic lot of union members, but to develop political power to achieve political ends and hence, Congress, in the exercise of its discretion, concluded that extension of the benefits of the Act to such labor organizations would not serve to promote the policies of the Act, but might endanger national interests. The reasonableness of that conclusion was for Congress to determine, *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 708, and since there existed a substantial basis in fact for the conclusion reached by Congress, it seems to me that it was rational for Congress to conclude that members of the Communist Party or persons affiliated with such party who believe in and teach the overthrow of the United States Government by force or by any illegal or unconstitutional methods were more likely than others to misuse the powers which inhere in union office. Hence I conclude that Congress acted within its constitutional powers.

The point is made that the section is invalid because the phrases "any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods," "affiliated with," and the word "supports" are vague and indefinite and must fall before the First, Fourth and Fifth Amendments. For the reasons set forth in *National Maritime Union* v. *Herzog, supra*, I think the contention lacks merit. In addition, I believe that the statue is as specific as the nature of the problem permits. Compare *Dunne* v. *United States*, 138 F. 2d 137, 143. Moreover, the language is not so vague that men of common intelligence would have to guess at its meaning and differ as to its application. It requires only that persons who knowingly engage in the activities set forth in §9(h), or who knowingly believe in the enumerated doctrines, or who knowingly support organizations which disseminate such doctrines, shall not obtain access to the machinery set up by Congress for

the purpose of advancing a specific public policy; hence [fol. 440] if an affiant honestly believes that he is not affiliated with the Communist Party, that he does not support any organization which to his knowledge teaches the overthrow of the United States Government by means which he knows to be illegal or unconstitutional, such an affiant would be in no danger of conviction under Sec. 35(A) of the Criminal Code, 18 U. S. C. A. §80. Compare *United States* v. *Gilliland*, 312 U. S. 86, 91; *Screws* v. *United States*, 325 U. S. 91, 101-105. See also *United States v. Petrillo*, 332 U. S. 1.

The point is made that §9(h) is a bill of attainder, because, so it is said, the section proceeds not by way of defining a harmful activity and setting up sanctions against such activity, but by way of a legislative declaration of the guilt of individuals and groups with respect to engaging in such activities.

In my opinion this contention is unsound. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *The State of Missouri*, 71 U. S. 277, 323. Section 9(h) does not rest upon any finding of guilt, but like the disqualification of convicted felons from medical practice in *Hawker v. New York, supra*, and the disqualification of aliens from operating poolrooms in *Clarke v. Deckebach, supra*, it operates not to impose punishment but to safeguard important public interests against potential evil. And as was said by Mr. Justice Murphy, "nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality." *North American Co.* v. *Securities & Exchange Commission, supra*, 711.

I conclude the petitions to set aside the Board's order ought to be denied and the request for its enforcement granted.

JUDGE MINTON *concurs* in this opinion.

[fol. 441] And on the same day, to-wit, on the twenty-third day of September, 1948, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition to set aside the order of the National Labor Relations Board entered in this cause on April 12, 1948, be denied and that the Board's request for enforcement of the said order be granted.

No. 9634

UNITED STEEL WORKERS OF AMERICA, C.I.O., et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition to set aside the order of the National Labor Relations Board entered in this cause on April 12, 1948, be denied and that the Board's request for enforcement of the said Order be granted.

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[fol. 442] And afterward, to-wit, on the twenty-eighth day of October, 1948, the following further proceedings were had and entered of record, to-wit:

[fol. 443] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

DECREE

The National Labor Relations Board having issued its order against Inland Steel Company on April 12, 1948, Inland Steel Company having petitioned this Court for review of said order, and United Steelworkers of America, C.I.O., et al., having petitioned this Court for review of certain portions of said order, and National Labor Relations Board by its cross prayer having prayed for the enforcement of said order, and this Court having considered said petitions and cross prayer and issued its decision on September 23, 1948, enforcing said order, it is hereby

Ordered, adjudged, and decreed that Inland Steel Company and its officers, agents, successors, and assigns shall

[fol. 444] 1. Cease and desist from:

(a) Refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) (hereinafter called "the Union") with respect to its pension and retirement policies, if and when

said labor organization shall have complied within thirty (30) days from the date of this Decree (or, in the event that the Union shall file a petition for a writ of certiorari in the Supreme Court of the United States within the time limited by law, then within thirty (30) days after the denial of such petition, or, if said petition be granted, within (30) days after the issuance of the mandate of the Supreme Court of the United States in the proceedings upon said writ of certiorari) with Section 9 (h) of the Act as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants of Inland Steel Company, excluding foremen, assistant foremen, supervisory office and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;

(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above.

[fol. 445] 2. Take the following affirmative action:

(a) Upon request and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above, bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post in conspicuous places throughout its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached hereto marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Thirteenth Region, shall, after being duly signed by the representative of Inland Steel Company, be posted by Inland Steel Company immediately upon receipt thereof and maintained by it for thirty (30) consecutive days thereafter and also for an additional thirty (30) consecutive days in the event of com-

pliance by the Union with the filing requirements of the Act, as amended, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Inland Steel Company to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Thirteenth Region aforesaid in writing, within ten (10) days from [fol. 446] the date of this Decree, and again within ten (10) days from the future date, if any, on which Inland Steel Company is officially notified that the Union has met the condition hereinabove set forth, what steps it has taken to comply herewith.

Dated this 28th day of October, 1948.

J. Earl Major, Judge, United States Circuit Court of Appeals for the Seventh Circuit; Otto Kerner, Judge, United States Circuit Court of Appeals for the Seventh Circuit; Sherman Minton, Judge, United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 447] APPENDIX A

Notice to all Employees: Pursuant to decree of the United States Circuit Court of Appeals enforcing a decision and order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees:

We will not refuse to bargain collectively with Local Unions Nos. 1010 and 64 of the United Steelworkers of America (CIO), as the exclusive representative of all of the employees in the bargaining unit described herein with respect to our pension and retirement policies, provided said labor organization complies, within the time allowed for such compliance by the decree of the Circuit Court of Appeals enforcing the said Order of the National Labor Relations Board, with Section 9 (h) of the National Labor Relations Act, as amended.

We will not make any unilateral changes in our pen-

sion and retirement policies affecting any employees in the bargaining unit without prior consultation with the Union, provided said labor organization complies within the time allowed for such compliance as above set forth, with Section 9 (h) of the National Labor Relations Act, as amended.

The bargaining unit is: all production, maintenance and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, exclud-
[fol. 448] ing foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

Inland Steel Company (Employer), by —— ——
(Representative), —— (Title).

Dated —— —, ——.

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

[fol. 449] And on the same day, to-wit, the twenty-eighth day of October, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On petition of counsel for the Inland Steel Company, one of the Petitioners in the above entitled cause, it is or-

dered by the Court that the certification and issuance to the National Labor Relations Board of the Final Decree, entered by this Court in this cause today, be, and the same is hereby, stayed for a period of thirty (30) days.

[fol. 450] And afterward, to-wit, on the second day of November, 1948, there was filed in the office of the Clerk of this Court a Joint Designation of Transcript of Record, which Designation is in the words and figures following, to-wit:

[fol. 451] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 9612

INLAND STEEL COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Joint Designation of Transcript of Record for Use in the Supreme Court of the United States

The Clerk of this Court is hereby requested to prepare a Transcript of Record, for use in the Supreme Court of the United States on the several petitions for Certiorari to be filed by the parties to this joint Designation of Transcript of Record, consisting of the following parts of the proceedings before the Court of Appeals in the above entitled consolidated causes, and to certify such Transcript as having been prepared pursuant to this Joint Designation:

1. An appropriate entry showing filing of Petition to Review and Set Aside an Order of the National Labor Relations Board, filed by petitioner Inland Steel Company [fol. 452] on April 30, 1948, in No. 9612, with reference to

Appendix to said Petitioner's Brief in No. 9612, filed June 26, 1948, as containing such petition.

2. Petition for Review, filed in No. 9634, by petitioners United Steelworkers of America, C. I. O., et al., on June 9, 1948.

3. Order of Court consolidating causes Nos. 9612 and 9634, entered June 11, 1948.

4. An appropriate entry showing filing by National Labor Relations Board of Transcript of Record of Proceedings before Board, filed June 14, 1948, with reference to the three Appendices filed respectively, by Petitioner in No. 9612 on June 26, 1948, by Petitioner in No. 9634 on June 26, 1948, and by Respondent National Labor Relations Board on July 14, 1948, stating that the said three appendices contain all material portions of such Record.

5. An appropriate entry showing filing of Answer of National Labor Relations Board to Petitions of Petitioners in No. 9612 and No. 9634 to review order of National Labor Relations Board filed June 21, 1948, with reference to Appendix to Petitioner's Brief in No. 9612, filed June 26, 1948 as containing such Answer.

6. Order entered June 23, 1948 granting United Steelworkers leave to intervene in No. 9612.

7. An appropriate entry showing filing of Appendix to Petitioner's Brief in Cause No. 9612, filed June 26, 1948, with reference to such Appendix certified under separate cover as a part of this Transcript.

8. An appropriate entry showing filing of Appendix to Petitioner's Brief in Cause No. 9634, filed June 26, 1948, [fol. 453] with reference to such Appendix certified under separate cover as a part of this Transcript.

9. An appropriate entry showing filing of Appendix to Respondent's Consolidated Brief in No. 9612 and No. 9634, filed July 14, 1948, with reference to such Appendix certified under separate cover as a part of this Transcript.

10. Order of July 21, 1948, of hearing and taking Cause under advisement.

11. Answer of National Labor Relations Board to petitioner's motion (in No. 9612) to strike certain matter from the Appendix to the Board's Brief, filed July 22, 1948.

12. Opinion of Court, filed Sept. 23, 1948.

13. Order of court on opinion, entered September 23, 1948.

14. Decree of Court, entered October 28, 1948.

15. Order staying mandate, entered October 28, 1948.
16. Copy of present Joint Designation of Transcript of Record.
17. Certificate of Clerk to the Transcript of Record.

Ernest S. Ballard, Merrill Shepard, 120 South La Salle Street, Chicago 3, Illinois, Attorneys for Inland Steel Company, Petitioner in No. 9612; [fol. 454] Arthur J. Goldberg, Frank Donner, Abraham W. Brussell, 718 Jackson Place, N. W., Washington 6, D. C., Attorneys for United Steelworkers of America, C. I. O., et al., Petitioners in No. 9634 and Intervenors-Respondents in No. 9612.

[fol. 455] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of papers filed and proceedings had in accordance with the joint designation of record filed in this Court on Nov. 2, 1948, in No. 9612, Inland Steel Company, Petitioner, vs. National Labor Relations Board, Respondent, and Cause No. 9634, United Steel Workers of America, C. I. O., et al., Petitioners, vs. National Labor Relations Board, Respondent, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of November A. D. 1948.

Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal.)

[fol. 456] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 17, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following No. 336.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 457] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed January 18, 1949

It is hereby stipulated by the United Steelworkers of America, et al., petitioners, and by the National Labor Relations Board, respondent, that the printed appendix filed by United Steelworkers of America, et al. in the United States Court of Appeals for the Seventh Circuit, and the proceedings in that court heretofore printed by the Clerk of the United States Supreme Court, shall constitute the record in the above case in the Supreme Court.

Arthur J. Goldberg, Counsel for Petitioners; Philip B. Perlman, Solicitor General.

Dated: January 18, 1949.